(25,811)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

No. 145.

J. S. MULLEN, L. V. MULLEN, W. M. BONNER, AND WILL TROUT, PLAINTIFFS IN ERROR,

vs.

MALINDA PICKENS, FRANCES BELL, AND T. E. GLOVER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 2, 1918.

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1 *Return to Writ.*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Oklahoma, in the City of Oklahoma City, this 2 day of March, 1917.

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk Supreme Court of Oklahoma.

2 Filed in Supreme Court of Oklahoma Mar. 2, 1917. William M. Franklin, Clerk.

In the Supreme Court of the United States, Sitting at Washington, D. C.

No. 6020.

J. S. MULLEN et al, Plaintiffs in Error,

vs.

MALINDA PICKENS et al., Defendants in Error.

THE UCITED STATES OF AMERICA, *ss:*

The President of the United States to Malinda Pickens, Frances Bell and T. E. Glover, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Oklahoma, wherein J. S. Mullen, L. V. Mullen, W. M. Bonner and Will Trout, are plaintiffs in error, and Malinda Pickens, Frances Bell and T. E. Glover, are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Oklahoma this 27 day of February, 1917.

J. F. SHARP,
Chief Justice.

Attest:

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN, *Clerk.*
By N. C. ORR, *Ass't.*

3 Filed in Supreme Court of Oklahoma Mar. 2, 1917. William M. Franklin, Clerk.

STATE OF OKLAHOMA,
County of Pittsburg:

I, Thad Conn, Sheriff of Pittsburg County, Oklahoma, do hereby certify that I received the within and foregoing citation and process for service on the defendants in error therein named, Malinda Perkins, Frances Bell, and T. E. Glover, upon the 1st day of March, 1917, and upon the 1st day of March, 1917, I served the same upon the said defendants in error and each of them in Pittsburg County, Oklahoma, by then and there delivering unto C. S. Arnold a full, true, correct and complete copy thereof, with all the indorsements thereon, he, the said C. S. Arnold being then and there attorney of record for the said defendants in error and each of them.

In testimony whereof, witness my hand this 1st day of March, 1917.

THAD CONN,
Sheriff of Pittsburg County, State of Oklahoma,
By E. T. GABBERT,
Deputy.

STATE OF OKLAHOMA,
County of Pittsburg:

I, E. T. Gabbert, being of lawful age and being first duly sworn, upon my oath say that I am deputy sheriff of Pittsburg County, Oklahoma, and that the statements and allegations in the above and foregoing return of service are true and correct.

E. T. GABBERT.

Subscribed and sworn to before me this 1st day of March, 1917.

[Seal of S. L. Nealon, Notary Public, Pittsburg County, Okla.]

S. L. NEALON,
Notary Public.

My commission expires Jan. 8th, 1919.

4 Filed in Supreme Court of Oklahoma Feb. 27, 1917. William M. Franklin, Clerk.

In the Supreme Court of the United States, Sitting at Washington, D. C.

No. —.

J. S. MULLEN et al., Plaintiffs in Error,

vs.

MALINDA PICKENS et al., Defendants in Error.

Petition for Writ of Error.

Plaintiffs in error, J. S. Mullen, L. V. Mullen, W. M. Bonner and Will Trout, complaining of the defendants in error, Malinda Pickens, Frances Bell and T. E. Glover, state:

That heretofore, to-wit, on the 11th day of March, 1913, the defendants in error, Malina Pickens and Frances Bell, filed their petition in the District Court of Grady County, Oklahoma, against Will Trout, J. S. Mullen, L. V. Mullen and W. M. Bonner, wherein in said petition it was alleged that Malinda Pickens and Frances Bell are enrolled as full-blood Choctaw Indians.

It was further alleged that the said Malinda Pickens and Frances Bell were the owners of the fee simple title and the equitable title in and to the following described lands, to-wit:

5 The North 5.33 acres of Lot No. 17 and the North 14.69 acres and the South East 10 acres of Lot No. 13 and the East 20 acres of Lot No. 14 in Section 30; and the South west quarter of the North west quarter of the North West quarter and the west half of the South west quarter of the North west quarter, and the Northwest quarter of the North west quarter of the Southwest quarter and the South half of the northwest Quarter of the Southwest quarter and the Southwest quarter of the Southwest quarter and the West half of the Southeast quarter of the Southwest quarter of Section 29; all in Township 5 North, Range 7 West of the Indian Base and Meridian containing 170.02 acres of land, according to the United States Government Survey thereof.

the same being lands allotted to Eliza Bell, deceased, who was the mother of Malinda Pickens and Frances Bell.

It was further alleged that Eliza Bell died February 12th, 1905, leaving as her sole surviving heirs at law Malinda Pickens and Frances Bell.

It was further alleged that the defendants in said suit unlawfully entered possession of said lands in September, 1910, and were unlawfully holding possession of said lands.

It was further alleged that on the 30th of October, 1912, the de-

fendants in said suit had recorded in the office of register of deeds of Grady County, Oklahoma, a warranty deed from Malinda Pickens to the defendants, J. S. Mullen, L. V. Mullen and W. M. Bonner, which said conveyance was recorded in Book 84, page 426, and that a copy of said deed was attached to such petition, and which deed shows to have been issued on the 23rd of September, 1905. And it was also alleged in said petition that the defendants had a certain affidavit of F. M. Adams recorded in the office of register of deeds in Book 72, page 104, and a copy of the affidavit was attached to the petition. It was then alleged that the deed executed by Malinda Pickens to the defendants, J. S. Mullen, L. V. Mullen and W. M. Bonney did not convey the lands specifically described above, or any part thereof, nor did the affidavit convey any interest.

6 It was alleged then that both the conveyances were void, but that they constitute a cloud upon the title of the plaintiffs in the trial court.

There was a prayer for possession of the land and damages in the sum of One Thousand Dollars; and a further prayer for judgment cancelling the deed as a cloud upon plaintiffs' title.

The answer of the defendants, J. S. Mullen, L. V. Mullen and W. M. Bonner was, first, a general denial; second, the answer was made a cross-petition and in the cross petition it was alleged that the land sued for by plaintiffs is the land allotted in the name of Eliza Bell, deceased, in lieu of certain other lands which had theretofore been allotted in the name of Eliza Bell, deceased, by the regularly appointed administrator, and which said lands first selected in allotment were conveyed by warranty deed to the defendants in the trial court, J. S. Mullen, L. V. Mullen and W. M. Bonner, and for which said lands so conveyed the said defendants, J. S. Mullen, L. V. Mullen and W. M. Bonner paid a valuable consideration therefor, and in said warranty deed so executed the following provision was in said conveyance:

"If for any reason the allotment of the said Eliza Bell, deceased, as described, be cancelled set aside and *and* held for naught, and afterwards be filed at any point in the Choctaw and Chickasaw Nation, then this deed and its warranties and covenants shall apply to said lands so hereinafter selected the same as if it were described in this instrument, and if it be necessary for another deed to be executed to the lands thereafter selected, then the grantors covenanted and warranted that they would execute such a deed."

7 It was further alleged in the cross petition that on the 23rd of September, 1905, the date of the execution of said warranty deed by the heirs of Eliza Bell, deceased, that the heirs were citizens of the United States and entitled to all the rights and privileges of such citizens, and that the heirs were unrestricted Indians, and that the lands described in said conveyance were unrestricted lands.

It was further alleged by said defendants, J. S. Mullen, L. V. Mullen and W. M. Bonner that the lands first selected were lost in contest proceedings, and that the lands described in the plaintiffs' petition were selected in lieu of the lands described in the warranty deed of date September 23, 1905, and that by reason of the cove-

nants in said deed of conveyance, the defendants, J. S. Mullen, L. V. Mullen and W. M. Bonner were entitled to a conveyance from the heirs, conveying the lands described in the plaintiffs' petition. The prayer of the cross petition was that the plaintiffs take nothing, and that the defendants, J. S. Mullen, L. V. Mullen and W. M. Bonner have judgment decreeing the specific performance of their contract, of date September 23, 1905, and that their title to said lands be quieted, and that all conveyances legally affecting their title be cancelled and held for naught.

The defendants in the trial court T. E. Glover and Will Trout filed their answer admitting that Malinda Pickens and Frances Bell were the owners of the land, and admitted that they were allotted to Eliza Bell, deceased. So far as these defendants are concerned, they were simply there as tenants and they assert no title in themselves. Thereafter a demurrer was filed by the plaintiffs in the trial court,
8 which demurrer was sustained, and the defendants in the trial court electing to stand upon their answers, final judgment was entered in the trial court of Grady County on the 18th day of October, 1913, in favor of the plaintiffs in the trial court, and against J. S. Mullen, L. V. Mullen and W. M. Bonner, and to which exceptions were saved. Thereafter the cause was regularly appealed to the Supreme Court of the State of Oklahoma, and on the 29th day of February, 1916, the Supreme Court of the State of Oklahoma rendered its final judgment herein, whereby the judgment of the trial court of Grady County, Oklahoma, was affirmed.

The plaintiffs in error herein, J. S. Mullen, L. V. Mullen and W. M. Bonner would further respectfully represent and state unto this Honorable Court that in the trial of this cause in the District Court of Grady County, Oklahoma, and in the Supreme Court of the State of Oklahoma, and which said Supreme Court of the State of Oklahoma is the court of Last Resort in said State of Oklahoma, and that in the record and proceedings and transcript, to which a reference is here made, manifest error occurred and was committed by said Supreme Court of the State of Oklahoma, to the damage of these plaintiffs in error, whereof they feel themselves aggrieved.

Plaintiffs in error would further respectfully represent and state unto this Honorable Court that in the record and proceedings and the transcript it will appear that there was drawn in question a construction of the Supplemental Treaty between the Chickasaw and Choctaw Nations and the United States of America, Section 22 (32 Statutes at Large 641); and also a construction of what is commonly known as the "Atoka Agreement" of June 28, 1898, (30 Statutes at Large 495); also the Act of Congress of April 26, 1906, (— Statutes at Large —).

9 Plaintiffs in error would further represent and state to this Honorable Court that it was necessary to construe said Acts of Congress by the Supreme Court of the State of Oklahoma, in order to render the final decree and judgment that was rendered herein.

Wherefore, Your petitioners, feeling themselves aggrieved by said final judgment of the Supreme Court of the State of Oklahoma, appeal from said judgment, and the whole thereof, upon the reasons

specifically set out in the assignment of errors filed herewith, and pray the appeal may be allowed; that a writ of error be allowed and granted; that said final decree and judgment, all pleadings, mandate judgment, orders, transcript and other proceedings had in said cause may be transmitted to the Supreme Court of the United States, to the end that this Honorable Court may hear said cause anew, and that the judgment and decree of the Supreme Court of the State of Oklahoma be reversed, and that a decree may be made herein remanding said cause for further proceedings in the court below, or that such decree may be made as to this Honorable Court may seem just and proper.

H. A. LEDBETTER AND
F. M. ADAMS,
Attorneys for Plaintiffs in Error.

10 Filed in Supreme Court of Oklahoma Feb. 27, 1917. William M. Franklin, Clerk.

In the Supreme Court of the United States, Sitting at Washington, D. C.

No. —.

J. S. MULLEN et al., Plaintiffs in Error,

vs.

MALINDA PICKENS et al., Defendants in Error.

Assignment of Errors.

Plaintiffs in error J. S. Mullen, L. V. Mullen, and W. M. Bonner, complaining of the defendants in error, Malinda Pickens and Frances Bell, state:

That in the Supreme Court of the State of Oklahoma a final judgment and decree was rendered against these plaintiffs in error, and in favor of the defendants in error herein, and from which said judgment the plaintiffs in error have appealed to this Honorable Court; and a writ of error having been duly issued, signed by the United States District Clerk for the Western District of Oklahoma, and by the Honorable J. F. Sharp, Chief Justice of the Supreme Court of the State of Oklahoma;

Now, therefore, the premises considered, the plaintiffs in error, J. S. Mullen, L. V. Mullen and W. M. Bonner, assign as error of the Honorable Supreme Court of the State of Oklahoma the following:

11 First. The Supreme Court of the State of Oklahoma erred in its construction of Section 22 of the Act of Congress of 1902, ratified by treaty September 25, 1902 (32 Statutes at Large —), wherein said Supreme Court of the State of Oklahoma held that the deed executed by the defendants in error herein was insufficient to

convey the lands selected in lieu of the lands described in said conveyance, for that under said deed so executed and by reason of said Section 22 of the Act of Congress ratified September 25, 1902, the lands so selected in allotment were alienable and the heirs who inherited the said lands, and being the defendants in error herein, were unrestricted in their right of alienation of said lands, and under said conveyance so executed by said heirs, they, the said defendants in error, being citizens of the United States, without restraint as to this character of land, they, the said defendants in error, Malinda Pickens and Frances Bell, had a lawful right to convey any land that might be selected in lieu of the lands described in said conveyance, and that the said defendants in error had a right to contract to convey any lands that might have been selected in lieu of the lands described in said conveyance.

Second. The Supreme Court of the State of Oklahoma erred in holding that the defendants in error could not convey and could not contract to convey land not selected in allotment, although the said defendants in error are shown by the record herein to be citizens of the United States; and, although the record shows that the said defendants in error had selected their own allotments, for that, the lands involved in this controversy were lands inherited by the said defendants in error under said section 22 of said Act of Congress of September 25, 1902.

12 And these plaintiffs in error say that by said conveyance so executed by the defendants in error to these plaintiffs in error, the estate conveyed by them to these plaintiffs in error is, and was, an estate of expectancy.

Third. The Supreme Court of the State of Oklahoma erred in holding that the deed and contract to convey executed by the defendants in error to the plaintiffs in error herein were void.

For all of which reasons plaintiffs in error pray that this cause be reversed, and that they have all other relief to which they may be entitled.

H. A. LEDBETTER AND
F. M. ADAMS,
Attorneys for Plaintiffs in Error.

13 Filed in Supreme Court of Oklahoma Feb. 28, 1917. William M. Franklin, Clerk.

In the Supreme Court of the United States, Sitting at Washington, D. C.

No. —.

J. S. MULLEN et al., Plaintiffs in Error,

vs.

MALINDA PICKENS et al., Defendants in Error.

The President of the United States of America to the Honorable J. F. Sharp, Chief Justice of the Supreme Court of the State of Oklahoma, and the Associate Justices of said Court, and to the Clerk of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record of the proceedings as *was* in the rendition of the judgment of a proceeding which is in the Supreme Court of the State of Oklahoma, before you, being the highest Court of law and equity in which a decision can be had in said suit between J. S. Mullen, L. V. Mullen, W. M. Bonner and Will Trout, as plaintiffs in error, and Malinda Pickens and Frances Bell and T. E. Glover, as defendants in error, wherein a final decree and judgment was rendered in said cause in favor of the defendants in error, quieting the title to that portion of the allotment of Eliza Bell, deceased, in the defendants in error, designated and commonly known as the allotment of Eliza Bell, deceased, and cancelling of record the conveyances of the plaintiffs in error, who sought to derive their title from the said defendants in error herein, and adjudging that
14 these plaintiffs in error take nothing by said petition in error, and where in said judgment of the said Supreme Court of the State of Oklahoma there was drawn in question the construction of said Acts of Congress and certain Treaties between the Chickasaws and Choctaws and the United States, and by said judgment aforesaid of the said Supreme Court of the State of Oklahoma it was necessary for the Supreme Court of the State of Oklahoma to construe said Acts of Congress and Treaties aforesaid, in order to render judgment therein, and it appearing that manifest error has happened to the damage of the plaintiffs in error, as well as by their petition and assignments of error appears; and we being willing that the error, if any hath been committed, should be duly and speedily corrected, and full justice done between the parties in this behalf, do command that if judgment therein be given, that then under the seal distinctly and openly, you send a copy of the record of the proceedings aforesaid with all things concerning *to* them, duly authenticated and verified, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., to the Supreme Court of the United States within

thirty (30) days of the date hereof; that said record of said proceedings aforesaid be inspected by the Supreme Court of the United States, and may cause further to be done therein to correct that error, what, of right and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this, the 28 day of February, 1917.

[Seal of the United States District Court, Western District of Oklahoma.]

ARNOLD C. DOLDE,
Clerk of the District Court of the United States for the Western District of Oklahoma.

Allowed:
J. F. SHARP,
Chief Justice.

15 Filed in Supreme Court of Oklahoma Feb. 27, 1917. William M. Franklin, Clerk.

In the Supreme Court of the United States, Sitting at Washington, D. C.

No. —.

J. S. MULLEN et al., Plaintiffs in Error,

vs.

MALINDA PICKENS et al., Defendants in Error.

Order Fixing Amount of Bond.

The bond to supersede the judgment rendered herein is hereby fixed at the sum of $1000.00 and which said bond is executed to Malinda Pickens and Frances Bell and T. E. Glover, defendants in error herein, in said amount and approved; the same to act as supersedeas this the 27 day of February, 1917.

J. F. SHARP,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:

[Seal Supreme Court State of Oklahoma.]

W. M. FRANKLIN,
Clerk of the Supreme Court,
By N. C. ORR, *Ass't.*

16 Filed in Supreme Court of Oklahoma May 1, 1917. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 6020.

J. S. MULLEN et al., Plaintiffs in Error,

vs.

MALINDA PICKENS et al., Defendants in Error.

Bond.

Know all men by these presents, That we, J. S. Mullen, as principal, and L. V. Mullen and E. Dunlap as sureties are held and firmly bound unto Malinda Pickens and Frances Bell, in the sum of One thousand dollars ($1000.00) to be paid to said obligees, their successors, assigns, heirs, executors or administrators, to the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed and dated this 26th day of February, A. D. 1917.

Whereas, the above named plaintiffs in error hath prosecuted a writ of error to the Supreme Court of the United States to reverse a judgment rendered in the above entitled action by the Supreme Court of Oklahoma;

Now, Therefore, the condition of this obligation is such that if the above named plaintiffs in error shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and effect.

J. S. MULLEN et al., *Principal,*
By LEDBETTER & ADAMS,
His Attorneys.
J. S. MULLEN,
L. V. MULLEN,
E. DUNLAP, *Sureties.*

STATE OF OKLAHOMA,
County of Carter, ss:

L. V. Mullen and E. Dunlap being each first duly sworn, and upon oath state that they are each sureties on the above and
17 foregoing instrument, each for himself says, that he *is* worth more, than the sum of one thousand dollars, above all debts, liabilities, and exemptions allowed him by law, and each for himself says that he has property subject to execution of the value of more than one thousand dollars situated in the state of Oklahoma.

L. V. MULLEN.
E. DUNLAP.

Subscribed and sworn to before me this February 26, 1917.
[SEAL.] B. S. GARDENHIRE,
Notary Public.

My Commission expires 19 day of Nov. 1919.

I hereby approve the foregoing bond and sureties to operate as a supersedeas, this 1st day of March, A. D., 1917.
J. F. SHARP,
Chief Justice of the Supreme Court of Oklahoma.

18 Filed Jan. 24, 1914. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma, at Oklahoma City.

No. 6020.

J. S. MULLEN et al., Plaintiffs in Error,

vs.

MALINDA PICKENS et al., Defendants in Error.

Petition in Error.

Filed Jan. 24, 1914. W. H. L. Campbell, Clerk.

Plaintiffs in Error, J. S. Mullen, L. V. Mullen, W. M. Bonner and Will Trout, complaining of the Defendants in Error, Malinda Pickens, Francis Bell and T. E. Glover, state that heretofore to wit, on the 18th day of October, 1913, in the District Court of Grady County, Oklahoma, the defendants in error, Francis Bell and Malinda Pickens, recovered a judgment against the above named plaintiffs in error and also against T. E. Glover, which judgment was for the possession of N. 5.33 acres of Lot 17 and N. 14.69 acres and S. E. 10 acres of Lot 13, and the E. 20 acres of Lot 14 of section 30 and S. W./4 N. W./4 N. W./4 and W./2 S. W./4 N. W./4 and N. W./4 N. W./4 S. W./4 and S./2 N. W./4 S. W./4 and S. W./4 S. W./4 and W./2 S. E./4 S. W./4 section 29, all in Township 5 North, Range 7 West of the Indian Base and Meridian and quieting title thereto in the said Francis Bell and Malinda Pickens and cancelling of record in the office of the Register of Deeds of Grady County, Oklahoma, certain conveyances in favor of the plaintiffs in error, J. S. Mullen, L. V. Mullen and W. M. Bonner, and for judgment for costs in their favor and against the plaintiffs in error, as well as the defendant in error T. E. Glover, the original case made and transcript of said proceedings being hereto attached, made a part hereof and marked exhibit "A," and these plaintiffs in error hereby make the said T. E. Glover, a party defendant in error, they being unauthorized to represent him as plaintiff in error, the said T. E. Glover being a person against whom judgment was entered in the trial court, and

these Plaintiffs in error ask that this proceeding be heard, as
19 though the — T. E. Glover was a plaintiff in error, and these plaintiffs in error say, there is error in said record, judgment and proceedings, for the following reasons, to wit:

First. The court erred in sustaining a demurrer to the answer and cross Petition of the plaintiffs in error, which was excepted to at the time.

Second. The judgment of the trial court is contrary to the law.

Third. The Court erred in rendering judgment against these plaintiffs in error, for the reason that the answer filed by them, showed that the said Francis Bell and Malinda Pickens had sold the land sued for by them to one R. H. Mitchell, which is shown in paragraph 5 of their said answer and cross petition, case made page 13.

Fourth. The Court erred in rendering judgment against these plaintiffs in error, without any testimony being offered to support the allegations of the petition of the defendants in error, which was excepted to by the plaintiffs in error at the time.

For all of which reasons, the plaintiffs in error pray for summons in error, and that upon hearing this cause be reversed, for all of which they will ever pray.

H. A. LEDBETTER,
Attorney for Plaintiffs in Error.

20 In the Supreme Court of the State of Oklahoma.

J. S. MULLEN et al., Plaintiffs in Error,

vs.

MALINDA PICKENS et al., Defendants in Error.

Appealed from the District Court of Grady County, State of Oklahoma.

Honorable Frank M. Baily, Trial Judge.

Appearances:

For Plaintiffs in Error: H. A. Ledbetter, Ardmore, Oklahoma.
For Defendants in Error: Kent V. Gay, McAlester, Oklahoma; C. S. Arnold and Bond & Melton, Chickasha, Oklahoma.

Case-made.

EXHIBIT "A."

Filed Dec. 19, 1913. S. L. Newman, Clerk of District Court, Grady County, Okla.
Filed Jan. 24, 1914. W. H. L. Campbell, Clerk.

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And be it remembered that on the 11th day of March, 1913, the Plaintiffs Malinda Pickens and Francis Bell, filed in the office of the Clerk of the District Court of Grady County, Oklahoma, a Petition against the Defendants Will Trout, J. S. Mullen, L. V. Mullen, and W. M. Bonner, which said Petition of the Plaintiffs is in words and figures as follows, to-wit:

22 In the District Court of Grady County, State of Oklahoma.

MALINDA PICKENS & FRANCES BELL, Plaintiffs,

vs.

WILL TROUT, J. S. MULLEN, L. V. MULLEN, and W. M. BONNER, Defendants.

Petition.

Comes now the Plaintiffs, Malinda Pickens and Frances Bell and complaining of and against the Defendants, Will Trout, J. S. Mullen, L. V. Mullen, and W. M. Bonner, respectfully represent and show to the Court:

1. That Plaintiffs, Malinda Pickens and Frances Bell, are enrolled as full blood Choctaw Indians and are residents of Pittsburg County, State of Oklahoma. That the defendant, Will Trout, resides in Grady County, Oklahoma; and that the Defendants J. S. Mullen, L. V. Mullen and W. M. Bonner, reside in Carter County, Oklahoma.

2. That Plaintiffs are the owners of the fee simple title and the equitable title in and to and are entitled to the immediate possession

of the following described real estate situate in Grady County, Oklahoma, to-wit:

The North 51.33 acres of Lot No. 17 and the North 14.69 acres and the South east 10 acres of Lot No. 13 and the East 20 acres of Lot No. 14 in section 30; and the South west quarter of the North west quarter of the North west quarter and the west half of the South west quarter of the North west quarter, and the north west quarter of the North west quarter of the South west quarter and the South half of the North West quarter of the South west quarter and the South west quarter of the South west quarter and the West half of the *of the* South east quarter of the South west quarter of Section 29; all in Township 5 North, Range 7 west of the Indian Base and Meridian, containing 170.02 acres of land, according to the United States Government Survey thereof.

The same being lands allotted to Eliza Bell deceased mother of Plaintiffs herein. The said Eliza Bell having died on February 12th, 1901, leaving surviving her as her sole heirs at law her two daughters, Malinda Pickens and Frances Bell, the Plaintiffs
23 herein.

3. That on or about the 9th day of September, 1910, the defendants unlawfully entered into the possession of the above described lands and now hold and ever since said date have unlawfully held possession thereof and have collected and converted to their own use and benefit the rents and revenues arising from said lands which Plaintiffs allege aggregate the sum of Five Hundred ($500.00) Dollars; and the Plaintiffs allege that because of the unlawful conversion of said rents and profits and because of the unlawful withholding of said lands they have been damaged in the sum of One Thousand ($1000.00) Dollars.

4. For further and other cause of action herein these plaintiffs allege that on the 30th day of October, 1912, the defendants had recorded in the office of the Register of Deeds for Grady County, Oklahoma, a warranty deed from Malinda Pickens to the defendants, J. S. Mullen, L. V. Mullen and W. M. Bonner, which is recorded in Volume 84 at page 426, a copy of which deed is hereto attached, marked Exhibit "A" and made a part hereof, which deed purports to have been executed on the 23rd day of September, 1905; and that on the same day, namely October 30th, 1912, the said defendants had recorded in the office of the Register of Deeds of Grady County, Oklahoma, an affidavit of F. M. Adams which purports to construe the deed aforesaid as conveying the lands first above described, which said affidavit is recorded at page 72 in Volume 104, Miscellaneous Records of Grady County, Oklahoma, a copy of which affidavit is hereto attached, marked Exhibit "B" and made a part hereof.

Plaintiffs further allege that said deed last above named does not convey the lands first above described or any interest therein,
24 nor does said affidavit convey or attempt to convey any interest in said lands, and as to said lands first above described both of said instruments are absolutely void; but by reason of the

recording of said instruments a cloud has been cast upon the title of these plaintiffs to said lands.

5. That the reasonable value of said lands is Two Thousand Five Hundred ($2,500.00) Dollars.

Wherefore, Premises considered, Plaintiffs pray that the defendants herein be summoned to appear and answer herein and that on final trial hereof Plaintiffs have judgment for the title and possession of said lands, for their damages in the sum of One Thousand ($1,000.00) Dollars; and they further pray that said instruments aforesaid be cancelled, set aside and annulled, and that all cloud cast upon plaintiff's title by reason thereof be removed; they further pray for costs of suit and for such other and further relief, both general and special, legal and equitable as they may show themselves entitled.

KENT V. GAY,
C. S. ARNOLD,
Attorneys for Plaintiff.

Exhibit "A" attached to the foregoing Petition, being as follows, to-wit:

EXHIBIT A."

UNITED STATES OF AMERICA,
Central District, Indian Territory:

Know all men by these presents: That I Malinda Pickens, a citizen by blood of the Choctaw Nation, and being the daughter of Eliza Bell, deceased, and being an adult, for and in consideration of the sum of Five Hundred dollars to me cash in hand paid, the receipt of which is hereby acknowledged, I hereby sell, transfer, and convey and by these presents, do sell, transfer and convey unto J. S. Mullen and unto L. V. Mullen and M. Bonner, of Ardmore, Indian Territory, their heirs, executors and administrators and assigns the following described land, together with all the improvements thereon situated, to-wit:

S. E./4 of N. W./4 of N. W./4 of Sec. 34 Tp. 4 S. R. 2 W. and N. E./4 of S. W./4 of N. W./4 of Sec. 32 Tp. 2S. R. 2 W. Less 2.50 acres for town of Graham, the S. W./4 of S. E./4 of Sec. 31; the S./2 of N. W./4 of S. E./4 of Sec. 31; the N. E./4 of N. W./4 of S. E./4 of Sec. 31 Tp. 2 S. R. 1 E.; the N. 1/2 of N. E./4 of N. E./4 of Sec. 6; the S. W./4 of N. E./4 of N. E./4 of Sec. 6; the E./2 of S. E./4 of N. W./4 of Sec. 6; the N. W./4 of N. E./4 of S. W./4 of Sec. 6; the N./2 of N. E./4 of S. W./4 of Sec. 6; and the N./2 of S. E./4 of S. W./4 of Sec. 6; the N. E./4 of S. W./4 of S. W./4 of Sec. 6, Tp. 3 S. R. 7 E.

To have and to hold the aforegranted lands unto the said J. S. Mullen and L. V. Mullen, their heirs, executors and administrators and assigns forever, together with all and singular the appurtenances, privileges and hereditaments thereunto belonging or in any wise appertaining, and I do and my heirs, executors, administrators and assigns, hereby covenant, with them, the said J. S. Mullen and L. V.

Mullen, their heirs, legal representatives, and assigns that I am lawfully seized in fee of the aforegranted lands; that the same are free and clear of all incumbrances, and that as one of the adult heirs of the said Eliza Bell, deceased, I have a perfect and legal right to sell the aforegranted lands; and I do and my heirs, executors and legal representatives hereby warrant the title thereto, unto the said J. S. Mullen and L. V. Mullen, their heirs and assigns, and agree to defend the same against all persons whomsoever.

That I further warrant and covenant with the said J. S. Mullen and L. V. Mullen and W. M. Bonner, that if, for any reason
26 the allotment of the said Eliza bell, deceased, as described be cancelled, set aside and held for naught, and afterwards be filed at any point in the Choctaw or Chickasaw county, that this deed and its warranties and covenants, shall apply to said lands so hereafter selected the same as if it were described in this instrument, and if it be necessary for me to hereafter execute the deed to the lands so selected, I hereby covenant and warrant to the said J. S. Mullen and L. V. Mullen and W. M. Bonner, their heirs, legal representatives, and assigns that I will so execute said deed.

In witness whereof, I hereunto affix my hand on this 23rd day of September, A. D. 1905.

MALINDA PICKENS.

Attest:
D. RUSSELL.
MARY L. BAKER.

UNITED STATES OF AMERICA,
Central District, Indian Territory:

Be it remembered, that on this 23rd day of September, 1905, personally appeared before me the undersigned notary public duly commissioned and acting within and for said District and Territory, Melinda Pickens, to me well known as being the person whose name is affixed to the foregoing instrument of writing and in the absence of her husband, Nelson Pickens, acknowledged to me that she had of her own free will and without any undue influence upon the part of her said husband, executed the same for the purposes and considerations therein mentioned and set forth as her own voluntary act and deed.

In witness whereof, I have hereunto set my hand on the day and year mentioned.

[SEAL.]

MARY L. BAKER,
Notary Public.

My commission expires Jan. 20, 1909.

27 Exhibit "B" attached to said Petition of the plaintiff is in words and figures as follows, to-wit:

"EXHIBIT B."

STATE OF OKLAHOMA,
Carter County, ss:

I, F. M. Adams, being first duly sworn upon oath state; that; I have examined the deed signed by Malinda Pickens, grantor to J. S. Mullen, L. V. Mullen and W. M. Bonner, grantees, conveying the lands of Eliza Bell, deceased; and that said deed conveyed the following described lands, to-wit: S. E./4 of N. W./4 of N. W./4 of Sec. 34 Tp. 4 S. R. 2 W. and N. E./4 of S. W./4 of N. W./4 of Sec. 32, Twp. 2 S. R. 2 W. less 2.50 acres for the town of Graham; and S. W./4 S. E./4 Sec. 31; S./2 of N. W./4 of S. E./4 of Sec. 31; and N. E./4 N. W./4 of S. E./4 Sec. 31; Twp. 2 S. R. 1 E. and N./2 of N. E./4 of N. E./4 of Sec. 6 of S. W./4 N. E./4 of N. E./4 of Sec. 6; and E./2 of S. E./4 of N. W./4 of Sec. 6; and N. W./4 of N. E./4 of S. W./4 of Sec. 6; and N./2 of N. E./4 of S. W./4 of Sec. 6; and N. W./2 of S. E./4 of S. W./4 of Sec. 6 and N. E./4 of S. W./4 of S. W./4 of Sec. 6 Tp. 3 S. R. 1 East of the Indian Meridian.

I further state that there is a provision in said deed providing as follows: If for any reason the allotment of the said Eliza Bell deceased, as described, be cancelled set aside and held for naught and afterwards be filed at any point in the Choctaw or Chickasha Country, then this deed and its warranties and covenants shall apply to said lands so hereinafter selected the same as if it were described in this instrument, and if it be necessary for me to here*in*after execute a deed to the land so selected I hereby covenant and warrant to the said J. S. Mullen, L. V. Mullen and W. M. Bonner, their heirs, legal representatives and assigns, that I shall so execute said deed" which said deed was recorded in recording District No. 21, of the Indian Territory, on the 10th day of March, 1906, at 8 o'clock A. M. and
28 duly recorded in Book 31, on page 376 at Ardmore.

I further state that I have examined the original patents issued in the name of Eliza Bell, and that there was allotted to Eliza Bell, the following described lands, to-wit:—

North 5.33 acres Lot 17 and North 14.69 acres and southeast 10 acres of Lot 13 and east 20 acres of Lot 14 of Sec. 30, and S. W./4 of N. W./4 of N. W./4 and W./2 of S. W./4 of N. W./4 and N. W./4 of N. W./4 of S. W./4 and S./2 of N. W./4 of S. W./4 of Sec. 29, Tp. 5 North, Range 7 West; and S. E./4 of N. W./4 of N. W./4 of Sec. 34 Tp. 4 South, Range 2 West and N. E./4 of S. W./4 of N. W./4 less 2.50 acres for townsite of Graham. Sec. 32 Tp. 2 South, Range 2 West, and S. W./4 of S. W./4 and W./2 of S. E./4 of S. W./4 of Sec. 29, Tp. 5 N. R. 7 West and S. E./4 of S. E./4 of S. E./4 less 1.62 acres, right of way of Sec. 22 Tp. 2 North, Range 2 West, and W./2 of S. W./4 of S. W./4 of N. W./4 of Sec. 25, Tp. 1 South Range 2 West and S. W./4 of N. W./4 of N. W./4 and S./2 of N. E./4 of N. W./4 of Sec. 23, Tp. 8 South,

Range 2 West and East 20 acres Lot 1 and east 10 a. lot 2 Sec. 7, Twp. 9 South, Range 2 East.

Portion of which land was in lieu of that originally selected in the name of Eliza Bell deceased.

F. M. ADAMS.

Subscribed and sworn to before me this October 29, 1912.
[SEAL.]
W. DUNLAP.

My commission expires Jan. 11, 1915.

Said Petition of the plaintiff is endorsed on back as follows: No. 3245. In the District Court in Grady County. Malinda Pickens & Frances Bell, Plaintiffs, vs. Will Trout, J. S. Mullen, L. V. Mullen and W. M. Bonner, Defendants. Petition. Filed Mar. 11, 1913. S. L. Newman, Clerk of District Court, Grady County, Okla.

29 And be it remembered that præcipes for summons were thereupon duly filed in said cause, and the summons to said defendants were thereupon issued: Which said Summons were thereafter in due time returned showing service upon each and all of said defendants.

And be it remembered that on the first day of April, 1913, the defendants, and each of them, filed in said cause their Answer and Cross Petition to the Petition of the plaintiff; which said Answer and Cross Petition of the defendants is in words and figures as follows, to-wit:

In the District Court of Grady County, Oklahoma, at Chickasha.

No. —.

MALINDA PICKENS & FRANCES BELL, Plaintiffs,

vs.

WILL TROUT, J. S. MULLEN, L. V. MULLEN, and W. M. BONNER, Defendants.

Answer.

Comes now the defendants Will Trout, J. S. Mullen, L. V. Mullen and W. M. Bonner, and for answer to the Petition of the Plaintiff filed herein deny, each and every, all and singular the allegations therein contained.

1. Further answering and by way of cross-petition these defendants say: that the lands sued for by plaintiff is that land allotted to Eliza Bell, deceased, in lieu of S. W./4 S. E./4 Sec. 31, S./2 N. W./4 S. E./4 Sec. 31 and N. E./4 S. W./4 Sec. 31, Tp. 2 S. R. 1 East; and N./2 of N. E./4 N. E./4 and S. W./4 N. E./4 N. E./4 Sec. 6 and E./2 of S. E./4 N. W./4 Sec. 6 and N. W./4 N. E./4 S. W./4 Sec. 6 and N./2 N. E./4 S. W./4 Sec. 6 and N./2

S. E./4 S. W./4 Sec. 6 and N. E./4 S. W./4 S. W./4 Sec. 6 Tp. 3 So. R. 1 East, which said last described land was selected in allotment by F. A. Bonner as administrator of the estate of Eliza Bell, deceased, which said last described land Malinda Pickens conveyed by warranty deed to the defendants J. S. Mullen, L. V. Mullen and W. M. Bonner, for which said land the defendants paid the sum of $520.00; and in which said deed of conveyance from the said Malinda Pickens to the said J. S. Mullen, L. V. Mullen and W. M. Bonner, the said Malinda Pickens to J. S. Mullen, L. V. Mullen and W. M. Bonner covenanted and warranted as follows:

"If for any reason the allotment of the said Eliza Bell deceased, as described, be cancelled, set aside, and held for naught and afterwards be filed at any point in the Choctaw and Chickasaw Country, then this deed and its warranties and covenants shall apply to said lands so hereinafter selected the same as if it were described in this instrument, and if it be necessary for me to hereafter execute a deed to the land so selected I hereby covenant and warrant to the said J. S. Mullen, L. V. Mullen, and W. M. Bonner, their heirs, legal representatives and assigns, that I shall so execute said deed.

2. Defendants say that at the time of the execution of said conveyance as of date September 23rd, 1905, that the said Malinda Pickens was a citizen of the United States and entitled to all of the rights and privileges as such citizen, and that she was at that time an unrestricted Indian and that the lands described in said conveyance were unrestricted lands.

3. The defendants further say that the lands first described herein were lost in contest proceedings, and that the lands described in plaintiff's petition were selected in lieu of the lands described in said deed of conveyance as of date September 23, 1905, and that by reason of the covenants in said deed of conveyance, of date September 23, 1905, these defendants are entitled to a conveyance from said Malinda Pickens conveying to them the lands described in plaintiff's said Petition.

4. Further answering these defendants say that Malinda Pickens and Frances Bell have no right, title claim or interest in and to said lands as against the defendants or either of them, nor are they entitled to any damages against these defendants.

5. Further answering these defendants say that Frances Bell, and Malinda Pickens, joined by her husband Nelson Pickens executed a deed, which deed was to R. H. Mitchell, which deed was approved by the County Judge of Pittsburg County October 20th, 1912, which order of approval as filed for record Nov. 7th, 1912, and recorded in book 104 page 114 of the records of Grady County, Oklahoma. By reason of which said R. H. Mitchell is a necessary party plaintiff of this suit.

Now having fully answered these defendants pray that the plaintiffs take nothing by their said Petition, and that these defendants have judgment against Malinda Pickens decreeing the specific performance of said contract as of date September 23rd, 1905, and that the conveyance made by Frances Bell and Malinda Pickens, as ap-

proved by the County Court, of Pittsburg County be cancelled, set aside and held for naught, and for all other relief to which they may be entitled.

H. A. LEDBETTER,
Attorney for Defendants.

STATE OF OKLAHOMA,
Carter County, ss:

I, J. S. Mullen, being first duly sworn on oath state that I am one of the defendants in the above styled and numbered cause, and further state that I have read the above, within and fore-
32 going answer and that the matters, facts and things therein set forth and alleged are true.

Subscribed and sworn to before me this March 31, 1913.

_____,
Notary Public.

My commission expires Jan. 11, 1915.

Endorsed on back as follows: No. 3245. Malinda Pickens et al. vs. Will Trout et al. Answer and Cross Petition. Filed Apr. 1, 1913. S. L. Newman, Clerk of District Court, Grady County, Oklahoma, by Edna T. Watkins, Deputy. H. A. Ledbetter, Attorney for defendants.

And be it remembered that on the 8th day of April, 1913, the plaintiffs filed in said cause their Demurrer to the answer and cross petition of the defendants; which said Demurrer is in words and figures as follows, to-wit:

33 In the District Court of Grady County, State of Oklahoma.

MALINDA PICKENS & FRANCES BELL, Plaintiffs,

vs.

WILL TROUT, J. S. MULLEN, L. V. MULLEN AND W. M. BONNER, Defendants.

Demurrer.

Comes now the plaintiffs herein and demur to the Answer of the Defendants herein filed for the reason that if the facts therein alleged are taken as true they do not constitute a defense to plaintiffs' cause of action.

Said Plaintiffs specially demur to that portion of paragraphs one, two, three and four of said Answer which attempt to allege title to the lands in controversy to be in Defendants by reason of a purported deed given by Malinda Pickens on September 23rd, 1905, for the reason that said deed shows on its face that it is void as to said lands

in controversy, being given in direct violation of Acts of Congress then in force.

KENT V. GAY,
A. S. ARNOLD,
Attorneys for Plaintiffs.

Endorsed on the back as follows: No. 3245. In the District Court in Grady County. Malinda Pickens and Frances Bell, Plaintiffs, vs. Will Trout, J. S. Mullen, L. V. Mullen and W. M. Bonner, Defendants. Demurrer. Filed Apr. 8, 1913. S. L. Newman, Clerk of District Court, Grady County, Okla. Kent V. Gay, McAlester, Okla. Attorney for Malinda Pickens and Frances Bell.

34 And Be It Remembered that on the 16th day of September, the defendants filed in said cause their Supplemental Answer and Cross Petition, the same being in words and figures as follows, to-wit:—

In the District Court of Grady County, Oklahoma.

MALINDA PICKENS AND FRANCES BELL, Plaintiffs,

vs.

WILL TROUT, J. S. MULLEN, L. V. MULLEN AND W. M. BONNER, Defendants.

Amended and Supplemental Answer and Cross-Petition.

Comes now the defendants, J. S. Mullen, L. V. Mullen and W. M. Bonner, and not waiving, but replying upon a former Answer and cross-petition filed herein, but as supplemental thereto, and by way of cross-petition, alleges and says that R. L. Glover and T. E. Glover are necessary parties to the final determination of the above cause; that they are residents of Grady County, residing on the lands in controversy in this cause

Defendants allege that the said R. L. Glover went on and in possession of said lands as the tenant of these defendants; that without delivering up possession thereof, he is asserting some right, title, claim or interest in and to said lands, and refuses to pay rent for the use and occupation of said lands, and refuses to attorn to these defendants, and these defendants say that the right, title, claim and interest of the said R. L. Glover, and which he is attempting to set up, if any he has, is adverse and inferior to the right, title
35 claim and interest of these defendants, except that the said R. L. Glover went into possession of said lands as the tenant of these defendants, and that these defendants have no contract with the said R. L. Glover, but the said R. L. Glover fails and refuses to recognize these defendants as landlord and fails to and refuses to pay these defendants *and* rents on said lands.

Now these defendants say that the reasonable rental value of said

lands is the sum of $300.00 per year; that a major portion of said lands is in a state of cultivation and are income bearing; that unless a Receiver is appointed to preserve the rents, revenues and profits of said lands, the same are liable to be lost; that according to the information and belief of defendants, the said R. L. Glover is insolvent and unable to respond in damages; that defendants have no plain, adequate and complete remedy at law.

Wherefore defendants pray that the court permit the said R. L. Glover and T. E. Glover to be made parties defendant in this cause; that summons issue as provided by law, and that upon final trial hereof, these defendants have judgment against the said R. L. Glover and T. E. Glover for the sum of $300.00; that the court appoint a receiver, pending the determination of this cause, to take charge of the rents, revenues and profits from said lands, and of said lands, and rent the same out according to his own judgment; that the said R. L. Glover be required to set up his interest in said lands, and that upon final hearing hereof, the said R. L. Glover be enjoined from assierting any right, title, claim or interest to the right, title, claim and interest to these premises adverse to the right, title, claim and interest of these defendants, and for such other and
36 further relief as defendants may show themselves entitled to receive in the premises.

MONROE OSBORNE,
F. M. ADAMS,
Attorneys for Defendants.

STATE OF OKLAHOMA,
County of Grady, ss:

J. S. Mullen, being duly sworn, on his oath states that he is one of the defendants in the above styled cause; that he has read the above and foregoing and that the matters and things therein set out are true.

J. S. MULLEN.

Subscribed and sworn to before me this 9th day of September, 1913.

[SEAL.]

E. DUNLAP,
Notary Public.

My commission expires, 1-11-15.

Endorsements on back as follows: No. 3245. In the District Court of Grady County, Oklahoma. Malinda Pickens, et al., Plaintiff, vs. Will Trout, et al., Defendants. Supplemental answer and cross petition and application to make R. L. Glover party defendant. Filed Sept. 16, 1913. S. L. Newman, Clerk of District Court, Grady County, Okla.

And Be It Remembered that on the 13th day of September, 1913, the Court made the following order in said cause:

37 In the District Court of Grady County, Oklahoma.

MALINDA PICKENS et al., Plaintiffs,

vs.

WILL TROUT, J. S. MULLEN, et al., Defendants.

Order.

Now on this the 13th day of September, 1913, came on for hearing at chambers in Chickasha, the application of defendant J. S. Mullen for the appointment of a Receiver in the above styled cause, and the said J. S. Mullen appearing by attorney, and the defendant, R. L. Glover, D. T. Glover and —— —— appearing by attorney-, Bond & Melton; and after hearing the testimony introduced, and being well and sufficiently advised, the court is of the opinion that a receiver should be appointed.

Thereupon the said defendants pray the court to permit bond to discharge said receiver.

It is therefore ordered by the Court that C. W. Harper be and he is hereby appointed Receiver over the lands described in the petition filed herein, but if, within five days from this date, said defendants execute a good and sufficient bond conditioned for the payment of all rents that may be due for the year 1913 on said lands to the person entitled to receive the same, in the sum of $200.00, said bond to be approved by the Clerk of this court, said receiver shall be discharged.

FRANK M. BAILEY,
District Judge.

Endorsed on back as follows: No. 3245. Filed Sep. 18, 1913. S. L. Newman, Clerk of District Court, Grady County, Okla. By Edna T. Watkins, Deputy. Recorded Journal 6, page 383.

38 And be it remembered that on the said 18th day of September, 1913, the defendants, T. E. Glover, R. L. Glover and Will Trout, filed in said cause their Bond to discharge the Receiver appointed by the Court in said, cause, which said Bond is conditioned as required by law and was on said 18th day of September 1913, duly approved by the Clerk of said Court

And be it remembered that on the 26th day of November, 1913; T. E. Glover filed in said cause his Motion to be made a party defendant, also his Answer, which said Motion to be made a party defendant is as Follows, to-wit:

STATE OF OKLAHOMA,
Grady County:

In the District Court.

MALINDA PICKENS and FRANCES BELL, Plaintiffs,
vs.
WILL TROUT et al., Defendants.

Motion of T. E. Glover to be Made a Party Defendant Herein.

Comes now, T. E. Glover and *and* says that he is in possession of a portion of the lands involved in this litigation and described in plaintiffs' petition, and that he is a necessary and proper party to the final determination of this cause, as shown by his answer herewith submitted.

Wherefore, he asks that this Court make and enter its order making *his* a party defendant herein, and that he be permitted to forthwith file his answer.

BOND & MELTON,
Attorneys for T. E. Glover.

39 Said answer of the Defendant T. E. Glover and of the Defendant Will Trout, being in words and figures as follows, to-wit:

STATE OF OKLAHOMA,
Grady County:

In the District Court.

MALINDA PICKENS and FRANCES BELL, Plaintiffs,
vs.
WILL TROUT et al., Defendants.

Answer of T. E. Glover and Will Trout.

Comes now, the defendants herein, and for answer to the Petition of the plaintiff- herein filed, says:

I.

These answering defendants admit that Malinda Pickens and Frances Bell are the owners of the lands described in plaintiff's petition, and admits that said lands were allotted to Eliza Bell, deceased, and that she was the mother of the plaintiffs.

II.

For further answer herein these defendants say that they deny that they are now in unlawful possession of said lands hereinabove

described, denies that they are due plaintiffs $1,000.00 rent as plead in the third paragraph in said petition.

III.

For further answer herein, defendants say that they had made and entered into a contract with C. W. Harper, the duly qualified and acting agent of the plaintiffs herein, for the purchase of
40 the lands described in said petition, and that said contract is now and has been during all of the times alleged in plaintiffs' petition in full force and effect; that they have at all times since entering into said contract been ready and willing to perform the same, but that said plaintiffs have been unable to deliver to these defendants the fee title to said lands free of all incumbrances by reason of a certain deed plead in plaintiffs' petition, and these answering defendants say that under said contract they are not liable to plaintiffs herein, for the rents upon said lands, and that they are in possession of the same under the plaintiffs' contract, and as to all of the other matters facts and things alleged and set up in said petition these defendants say that they are not informed and therefore demand proof.

Wherefore, these defendants having fully answered herein pray judgment of the Court.

BOND & MELTON,
Attorneys for Defendants
Will Trout and T. E. Glover.

Endorsed on back as follows: 3245. Malinda Pickens et al., vs. Will Trout et al. Separate Answer of Will Trout and T. E. Glover. Filed Nov. 26, 1913. S. L. Newman, Clerk District Court.

41 And be it remembered that on the 18th day of September, 1913, the court made an order in said cause making T. E. Glover a party defendant in said cause; which said order is as follows, to-wit:

STATE OF OKLAHOMA,
Grady County:

In the District Court.

MALINDA PICKENS and FRANCES BELL, Plaintiffs,

vs.

WILL TROUT et al., Defendants.

Order Making Additional Parties Defendant.

Now, on this the 18th day of September, 1913, came on for hearing the motion of T. E. Glover to be made a party defendant herein,

and having tendered his answer in this cause, and it appearing that he is a necessary — to the action.

Now, therefore it is hereby ordered that T. E. Glover be made a party defendant in this action.

FRANK M. BAILEY,
Judge of the District Court.

Endorsed on back: 3545. Malinda Pickens vs. Will Trout et al. Order. Filed Nov. 26, 1913. S. L. Newman, Clerk of District Court, Grady County, Okla.

42 And be it remembered that on the 18th day of October, 1913, the court made an order and entered judgment in said cause sustaining the demurrer of the plaintiffs to the Answer and cross-petition of the defendants and rendering Judgment for the plaintiffs; which said order of the court is in words and figures as follows, to-wit:

In the District Court of Grady County, State of Oklahoma.

MALINDA PICKENS & FRANCES BELL, Plaintiffs,

vs.

WILL TROUT, J. S. MULLEN, L. V. MULLEN, and W. M. BONNER, Defendants.

Journal Entry.

Now on this 18th day of October, 1913, the same being one of the regular judicial days of the October, 1913, term of said court, this cause came on to be heard upon the Demurrer of Plaintiffs to the Answer of Defendants J. S. Mullen, L. V. Mullen and W. M. Bonner, and said demurrer being heard and considered by the Court, it is by the Court sustained, to which ruling of the court the said defendants in open court except, and the said defendants declining to plead further and desiring to stand upon their Answer, the Court thereupon, upon motion of plaintiffs, rendered judgment for Plaintiffs as follows:

The Court finds, upon allegations of the Petition there being no other evidence offered, that the lands in controversy and hereinafter described were allotted in the name of Eliza Bell, a deceased member of the Choctaw Tribe of Indians; that said Eliza Bell departed this life intestate on February 12th, 1905, leaving surviving her as her sole heirs at law the Plaintiffs herein, Malinda Pickens and Frances Bell and that said plaintiffs are now the sole
43 owners of and entitled to the immediate possession of said lands which are thus described:

Situate in Grady County, Oklahoma and being the North Five and 33/100 acres of Lot No. 17 and the North 14.69 acres and the S. E. 10 acres of lot No. 13 and the east 20 acres of Lot No. 14 of Section 30 (Thirty); and the S. W./4 of N. W./4 of N. W./4 and the W./2 of S. W./4 of N. W./4 and N. W./4 of N. W./4 of S. W./4

and S./2 of N. W./4 of S. W. and S. W./4 of S. W./4 and W./2 of S. E./4 of S. W./4 of Section twenty nine (29), all in township Five (5) North, Range seven (7) West of the Indian Base and Meridian, containing 170.02 acres of land according to the United States Government Survey thereof.

It is therefore ordered, adjudged and decreed by the Court that the Plaintiffs, Malinda Pickens and Frances Bell, do have and recover of and from the defendants, Will Trout, J. S. Mullen, L. V. Mullen and W. M. Bonner and T. E. Glover the title and possession of said above described land for which they may have a writ of possession. It is further ordered, adjudged and decreed by the court that all cloud cast upon the title of the Plaintiffs by reason of a certain warranty deed from Malinda Pickens to the defendants, J. S. Mullen, L. V. Mullen and W. M. Bonner, which is recorded in Volume 84 at page 426 in the office of the Register of Deeds for Grady County, Oklahoma, be and the same is hereby removed and said defendants and each of them are hereby barred and enjoined from further asserting any right, title, claim or interest in and to said lands or any part thereof. It is further ordered, adjudged and decreed by the Court that said plaintiffs have and recover of
44 and from the defendants, J. S. Mullen, L. V. Mullen, and W. M. Bonner all costs of this suit, for which let execution issue.

To which action of the court in sustaining said demurrer and rendering judgment for Plaintiffs and to such findings of fact and conclusions of law made by the court herein, said defendants, J. S. Mullen, L. V. Mullen and W. M. Bonner in open court excepts and give Notice of appeal to the Supreme Court of the State of Oklahoma; and the defendants are given sixty days from this date within which to prepare and serve casemade, and the Plaintiffs are given five days thereafter within which to suggest amendments and corrections thereto, same to be signed and settled upon ten days' notice by either party.

FRANK M. BAILEY,
Judge of the District Court of
Grady County, State of Oklahoma.

Endorsed on Back as Follows: No. 3245. In the District Court of Grady County. Malinda Pickens et al., Plaintiffs, vs. Will Trout et al., Defendants. Journal Entry. Filed Nov. 26, 1913. S. L. Newman, Clerk of District Court, Grady County, Okla. Recorded Journal 6, at page —. Kent V. Gay, McAlester, Oklahoma, Attorney for the Plaintiffs.

45 And be it remembered that on the 18th day of October, 1913, the defendants filed in said cause their Motion for a new trial, the same being as follows, to-wit:

In the District Court of Grady County, Oklahoma, at Chickasha.

MALINDA PICKENS et al., Plaintiffs,

vs.

WILL TROUT, J. S. MULLEN, L. V. MULLEN, and W. M. BONNER, Defendants.

Motion for New Trial.

Now comes the defendants and file this their Motion for new trial herein, and as grounds therefor, state the following:

1st. The Judgment is contrary to the law.

2nd. The Judgment is contrary to the evidence.

3rd. The judgment is contrary to the law and the evidence.

4th. The court erred in sustaining the demurrer of the plaintiffs to the Answer of the defendants.

For all of which reasons, the defendants pray that the judgment entered herein be set aside and that they be granted a new trial.

H. A. LEDBETTER,
Attorney for Defendants.

Endorsed on Back as Follows: No. 3245. Malinda Pickens et al., Plaintiffs, vs. Will Trout et al., Defendants. Motion for New Trial. Filed Oct. 18, 1913. S. L. Newman, Clerk of District Court.

46 And be it remembered that on the said 18th day of October, 1913, the court made an order overruling the Motion of the defendants for a new trial and granting an extension of time within which to prepare and serve a case made in said cause which said Order of the court is as follows, to-wit:

Journal 6, page —.

In the District Court of Grady County, Oklahoma, at Chickasha.

MALINDA PICKENS et al., Plaintiffs,

vs.

WILL TROUT et al., Defendants.

Order Overruling Motion for New Trial.

On this the 18th day of October, 1913, came on for hearing the Motion of the defendants for a new trial and the court after hearing the same, is of the opinion that said Motion for new trial of the defendants should be overruled, and to which action of the court in overruling said Motion, the defendants in open court except, and which exceptions the court allows. And thereupon in open court,

the defendants ask for additional time, other that that prescribed by the statutes within which to prepare and serve their case made, and the court being of the opinion that additional time should be granted to prepare and serve their case made, it is therefore further ordered, adjudged and decreed by the Court, that the defendants be given 60 days from this date within which to prepare and serve their case made and the plaintiffs are given five days thereafter to suggest amendments and the case-made to be settled by either party upon five days' written notice.

47 FRANK M. BAILEY, *Judge.*

Endorsed on Back as Follows: No. 3245. Malinda Pickens et al., Plaintiffs, vs. Will Trout et al., Defendants. Order Overruling Motion for New Trial. Filed Oct. 18, 1913. S. L. Newman, Clerk of District Court. Journal 6, Page —.

The above and foregoing being a full, true, complete and correct record and copy of all the pleadings filed in said cause, all the orders, rulings, holdings and judgments of the court made and entered in said cause, all exceptions, and a full, true complete and correct case made in said cause.

48 In the District Court of the 15th Judicial District of the State of Oklahoma in and for Grady County.

No. 3245.

MALINDA PERKINS et al., Plaintiffs,

vs.

WILL TROUT et al., Defendants.

Certificate of the Clerk.

STATE OF OKLAHOMA,
County of Grady, ss:

J. S. L. Newman, Clerk of the District Court in and for Grady County, State of Oklahoma, hereby certify that the above and foregoing case made contains a full, true, complest and correct record, transcript and copy of all the pleadings filed in the above entitled cause, all the orders, rulings, holdings and judgments of the court made and entered in said cause, and all the proceedings had in said cause, all the evidence therein, and that the same is true and correct and I do so certify.

Given under my hand and the seal of said court on this the 19th day of January, A. D. 1914.

[SEAL.] S. L. NEWMAN,
Clerk District Court of Grady County, Oklahoma,
By EDNA WATKINS,
Deputy.

Certificate of Clerk.

49 In the District Court of the 15th Judicial District Within and for the County of Grady.

No. 3245.

MALINDA PICKENS et al., Plaintiffs,

vs.

WILL TROUT et al., Defendants.

Service of Case Made.

To Malinda Pickens, Frances Bell, Will Trout and T. E. Glover or Their Attorneys of Record:

You are hereby and herewith served with copy of the Case made in the above styled and entitled cause, whereby and wherein the above named defendants appeal from the orders, in the above styled and numbered cause, to the Supreme Court of the State of Oklahoma.

J. S. MULLEN,
L. V. MULLEN,
W. M. BONNER, AND
WILL TROUT,
By H. A. LEDRETTER,
Their Attorney of Record.

Service of copy of the above and foregoing case made is hereby acknowledged to have been made on the undersigned, on this the 15 day of December, A. D. 1913.

MALINDA PICKENS,
FRANCIS BELL, AND
T. E. GLOVER,
By KENT V. GAY,
C. S. ARNOLD, AND
BOND, MELTON & MELTON,
Their Attorneys of Record.

Service of case made.

50 In the District Court of the 15th Judicial District Within and for the County of Grady.

No. 3245.

MALINDA PICKENS & FRANCES BELL, Plaintiffs,

vs.

WILL TROUT, J. S. MULLEN, L. V. MULLEN, W. M. BONNER and T. E. GLOVER, Defendants.

Stipulation and Agreement of Counsel & Waiver.

It is hereby stipulated and agreed by and between the undersigned attorneys of record for the above plaintiffs and defendants, that the

above and foregoing case made contains a full, true, complete and correct record and copy of all the pleadings filed in said cause, all the orders, holdings, rulings and judgments of the court made and entered in said cause, and is a true and correct case made in said cause.

The parties hereto hereby waive the suggestion of further amendments to said case made and consent and agree that the Judge of said court may sign, settle and allow the foregoing as such true and correct case made without notice being given of the time and place of the settling and signing of same.

Given under our hands on this the 15 day of December, 1913.

KENT V. GAY &
C. S. ARNOLD,
BOND & MELTON,
Attorneys of Record for the Above-named Plaintiffs and T. E. Glover, Defendant.
H. A. LEDBETTER,
Attorney of Record for the Above-named Defendants Except T. E. Glover.

Stipulation and Agreement of Counsel.

51 In the District Court of the 15th Judicial District within and for the County of Grady.

No. 3245.

MALINDA PICKENS et al., Plaintiffs,

vs.

WILL TROUT et al., Defendants.

Certificate of the Trial Judge.

STATE OF OKLAHOMA,
County of Grady, ss:

I, Frank M. Bailey, Judge of the above entitled Court, hereby certify that I have examined the foregoing case made and find the same to contain a full, true, and complete copy of all the pleadings filed in said cause, all the orders, rulings, holdings and the judgment of the court made and entered in said cause, and that the same is a true and correct case made in said cause.

And it appearing that said case made was served within the time allowed by the court for such purpose and that the parties hereto have waived *and* the suggesting of further amendments to the same and have waived Notice of the time and place of signing and settling case made.

I now hereby sign, settle and allow the foregoing as such true and correct record and case made in said cause, and direct that the Clerk

of the above entitled court attest the same and file the same of record in the above entitled Court.

Done in Chamber-, in the City of Chickasha, and within said District, on this the 15th day of December, A. D. 1913.

FRANK M. BAILEY,
Trial Judge.

Attest:

[SEAL.] S. L. NEWMAN,
Clerk of the District Court, Grady County, Okla.

(Certificate of Judge.)

52 In the Supreme Court of the State of Oklahoma.

J. S. MULLEN, L. V. MULLEN, and W. M. BONNER and WILL TROUT,
Plaintiffs in Error,

vs.

MALINDA PICKENS et al., Defendants in Error.

Waiver of the Issuance of Summons in Error.

Comes now the defendants in error, by their attorneys of record, and hereby enter their appear*nace* in the above entitled cause in said Supreme Court, and hereby waive the issuance and service of Summons in Error in said cause in said Supreme Court.

This the 15 day of Dec. A. D. 1913.

MALINDA PICKENS,
FRANCES BELL, AND
T. E. GLOVER,
By KENT V. GAY,
C. S. ARNOLD, AND
BOND, MELTON & MELTON,
Their Attorneys of Record.

Filed Jan. 24, 1914. W. H. L. Campbell, Clerk.

Waive- of the Issuance of Summons in Error in the Supreme Court.

53 Thereafter, to-wit, on November 2nd, 1915, at the October, 1915, term thereof, the Supreme Court of Oklahoma made the following order:

No. 6020.

J. S. MULLEN et al.

v.

MALINDA PICKENS et al.

And now on this day it is ordered by the court that the above cause be set for oral argument on December 17th, 1915. It is fur-

ther ordered that Plaintiff in Error have until November 22nd, 1915, to file brief; and that defendants in error be granted until November 12, 1915, to file answer brief.

54 Thereafter, to-wit, on December 17th, 1915, at the October, 1915, term thereof, the Supreme Court of Oklahoma made the following order:

No. 6020.

J. S. MULLEN et al.

v.

MALINDA PICKENS et al.

And now on this day the above cause is argued orally and the cause is submitted, and it is ordered by the court that plaintiff in error be allowed 20 days to file reply brief, and defendant in error 10 days to file reply brief.

55 Thereafter, to-wit, on February 29th, 1916, at the January, 1916, term thereof, the Supreme Court of Oklahoma made the following journal entry order:

No. 6020.

J. S. MULLEN et al.

vs.

MALINDA PICKENS et al.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the Court having considered the same finds that the judgment of the trial court in the above cause should be affirmed. *Upon* by Watts, C.

By the Court: It is so ordered, the opinion herein is hereby adopted in whole, and judgment is entered accordingly.

56 (Filed Feb. 29, 1916. William M. Franklin, Clerk.)

In the Supreme Court of the State of Oklahoma, Supreme Court Commission, Division No. 4.

No. 6020.

J. S. MULLEN et al., Plaintiffs in Error,

vs.

MALINDA PICKENS et al., Defendants in Error.

Syllabus.

A warranty deed from a restricted full-blood Choctaw Indian of September 23, 1905, whereby she conveyed all her interest in and to the theretofore selected allotment of her deceased mother, and which deed contained a provision: "That I further warrant and covenant with the said J. S. Mullen and L. V. Mullen and W. M. Bonner, that if, for any reason the allotment of the said Eliza Bell, deceased, as described be cancelled, set aside and held for naught, and afterwards be filed at any point in the Choctaw or Chickasaw country, that this deed and its warranties and covenants, shall apply to said lands so hereafter selected the same as if it were described in this instrument, and if it be necessary for me to hereafter execute the deed to the lands so selected, I hereby covenant and warrant to the said J. S. Mullen and L. V. Mullen, their heirs, legal representatives, and assigns that I will so execute said deed," did not by virtue of said provision, when subsequent thereto the selection of the land particularly described in the deed, was cancelled and annulled by the proper authorities, convey an equitable title to such after allotted land, concerning which, Malinda Pickens will be required to specifically perform. And where the pleadings show the above state of facts, it is not error for the court to sustain demurrer to the answer and award judgment for the plaintiff.

Error from the District Court of Grady County.

Frank M. Bailey, Judge.

Affirmed.

H. A. Ledbetter, Attorney for Plaintiffs in Error.

Kent V. Gay, and C. S. Arnold, Attorneys for Defendants in Error.

57 *Opinion of the Court.*

By WATTS, *C.*:

Defendants in error, Pickens and Bell, sued plaintiffs in error, J. S. and L. V. Mullin, W. M. Bonner, Will Trout and others in District Court of Grady County to clear title to and recover possession of certain real estate. The petition charges that Malinda Pickens and Frances Bell are enrolled as full-blood Choctaw Indians and

owners of the legal and equitable estate and entitled to immediate possession of certain real estate (omitting description), which was allotted to their mother, Eliza Bell, who died February 12th, 1905, leaving them as her sole heirs; that defendants were in unlawful possession collecting rents, and further charging that on October 30th, 1912, defendants had recorded in the office of the Register of Deeds of Grady County a warranty deed from Malinda Pickens to Mullen, Mullen and Bonner, executed September 23, 1905, copy of which was attached to the petition, and that also on October 30th, 1912, recorded in the office just mentioned an affidavit of F. M. Adams, which purported to construe the deed, a copy of the affidavit is attached to the petition; that said instruments were void and did not convey the land in controversy but were clouds on the title, praying judgment, etc. The deed attached is in the usual form but contained the following clause:

"That I further warrant and covenant with the said J. S. Mullen and L. V. Mullen and W. M. Bonner, that if, for any reason the allotment of the said Eliza Bell, deceased, as described be cancelled, set aside and held for naught, and afterwards be filed at any point in the Choctaw or Chickasaw country, that this deed and its warranties and covenants, shall apply to said lands so hereafter selected the same as if it were described in this instrument, and if it be necessary for me to hereafter execute the deed to the lands so selected, I hereby covenant and warrant to the said J. S. Mullen and L. V. Mullen, their heirs, legal representatives, and assigns that I will so execute said deed."

The affidavit shows among other things the description of the land contained in the deed, and also, description of the subsequent allotment, (same as in the petition) and that the deed was filed for record March 10th, 1906, in Recording District No. 21, Ind. Ter.

58 The answer charges the land sued for was the allotment of Eliza Bell, which was selected by her administrator in lieu of that described in the deed to Mullen, Mullen and Bonner and for which they paid $525.00, and in which the grantor agreed (same clause quoted above), and further charging that Malinda Pickens was a United States Citizen entitled to all the rights and privileges as such and at the date of the deed, the land was unrestricted; that the land described in the deed was lost in a contest proceeding and the land in controversy was selected in lieu thereof, and that by reason of the covenants of conveyance and provisions in the deed above quoted, defendants, Mullen, Mullen and Bonner, were entitled to conveyance from Malinda Pickens and that plaintiffs had no right, title, claim or interest to the land against them, praying that plaintiffs take nothing and they have judgment against Malinda Pickens for specific performance, as of September 23rd, 1905, etc.

The Court sustained a demurrer of Pickens and Bell to the answer and gave judgment for them, from which Mullen, Mullen and Bonner and Trout appeal.

As we understand from the oral argument of counsel, the only question for decision is, whether by the terms and conditions of the warranty deed from Malinda Pickens to J. S. and L. V. Mullen and

W. M. Bonner of date September 30th, 1905, conveying the land theretofore selected as the allotment of Eliza Bell, by operation of law, (in the event of the then selection being cancelled), thereby conveyed an equitable title to the after allotted land, concerning which, Malinda Pickens should be required to perform?

Case No. 5165, Robinson et al. v. Caldwell et al., not yet officially reported, but decided by this court on the 7th day of December, 1915, involves the same question as presented here. We have
59 carefully read and studied the briefs of counsel in the instant case but see no reason for changing our position. We therefore, follow any rely on Robinson et al. v. Caldwell et al., supra, and authorities therein cited as decisive of this case, to which reference is made for justification of the conclusions reached herein as well as therein.

We therefore hold that the deed from Malinda Pickens, a restricted full-blood Choctaw Indian of September 23, 1905, to J. S. and L. V. Mullen and W. M. Bonner, whereby she conv-yed all her interest in and to the theretofore selected allotment of her deceased mother, Eliza Bell, and which deed contained the provision (same as above set out), did not by virtue of said provision, when subsequent thereto the selection of the land particularly described in the deed, was cancelled and annulled by the proper authorities, convey an equitable title to such after allotted land, concerning which, Malinda Pickens will be required to specifically perform. And as the admitted pleadings show the above state of facts, it was not error for the court to sustain the demurrer to defendants' answer and award judgment for plaintiffs.

The judgment of the trial court should therefore be affirmed.

Feb. 29, 1916. By the Court: Adopted in whole.

60 *Certificate.*

I, William M. Franklin, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing 59 pages numbered from 1 to 59, inclusive, *is* a true and complete transcript of the record and all proceedings in said Supreme Court in the case of L. V. Mullen et al., Plaintiffs in Error, vs. *Anderson Gardner* et al., Defendants in Error, No. *6240*, as the same remains of record and on file in this office.

In Witness Whereof, I hereunto set my hand and attach the seal of said Court at the City of Oklahoma City, this 2 day of March, A. D. 1917.

[Seal Supreme Court, State of Oklahoma.]

WILLIAM M. FRANKLIN, *Clerk,*
By N. C. ORR, *Assistant.*

Endorsed on cover: File No. 25811. Oklahoma Supreme Court. Term No. 145. J. S. Mullen, L. V. Mullen, W. M. Bonner and Will Trout, Plaintiffs in Error, vs. Malinda Pickens, Frances Bell and T. E. Glover. Filed March 8th, 1917. File No. 25811.

FEB 5 1900

In the Supreme Court of the United States

S. MULLEN ET AL.,
Plaintiff in Error,

vs. No. 25

MALINDA PICKENS, ET AL.,
Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR

F. R. ELLIS,
F. M. ADAMS,
Attorneys for Plaintiff in Error.

AUTHORITIES CITED

Bledsoe vs. Wortham, 35 Okla., 261

Lynch vs. Franklin, 130 Pac., 599.

Mann vs. Wilson, 23 Howard 457.

Crews vs. Burcham, 1 Black 352.

Jones vs. Meehan, 175 U. S. 1.

Mullen vs. Jansen, 224 U. S., 448.

Foxcroft vs. Melette, 45 U. S. (4 Howard 376).

STATUTES CITED

Sec. 22 Supplemental Agreement
32 Stat at L 641.

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In the Supreme Court of the United States

J. S. MULLEN ET AL,
Plaintiff in Error,

VS. No. 145

MALINDA PICKENS, ET AL,
Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR

STATEMENT OF CASE

The Defendants in Error (plaintiffs below) filed their suit in the District Court of Grady County, Oklahoma, against the plaintiffs in error(defendants below), wherein they alleged that they were the owners in fee simple of the title to certain lands allotted to Eliza Bell, a Choctaw Indian, and in said petition alleged that Eliza Bell died February 12, 1905, leaving as her sole heirs Malinda Pickens and Frances Bell, who are the defendants in error here. They further alleged that on the 9th day of September, 1910, the plaintiffs in error unlawfully entered into the possession of said lands; that these plaintiffs in error placed of record in the office of the Register

of Deeds of Grady County, Oklahoma, on the 30th day of October, 1912, a warranty deed from Malinda Pickens to J. S. Mullen, L. V. Mullen and W. M. Bonner, which said deed purports to have been executed on the 23rd day of September, 1905, and that these plaintiffs in error also recorded an affidavit of F. M. Adams, which affidavit purports to construe the deed dated September 23, 1905. It was then alleged by the defendants in error in their said petition that the deed of date, Sept. 23, 1905, was void and of no effect and conveyed no title to the said J. S. Mullen, L. V. Mullen and W. M. Bonner, and that the two documents of record constituted a cloud upon the title of defedants in error. The prayer of said petition was for the possession of the lands, for damages and that the instruments of record be cancelled as clouds upon their title. (See transcript pages 13 to 15, inclusive.)

The plaintiffs in error (defendants below) filed their answer as shown on pages 18 and 19, inclusive, and thereafter filed an amended supplemental answer and cross-petition, which will be found commencing on page 21 of the case-made and ending on page 22 thereof; and in their answer first filed and their supplemental answer and cross-petition it was alleged as a defense that the lands sued for were allotted to Eliza Bell, deceased, in lieu of certain other lands, which lands were selected by F. A. Bonner as administrator of the estate of Eliza Bell, and which said lands were conveyed by warranty deed to the plaintiffs in error, J. S. Mullen, L. V. Mullen

and W. M. Bonner, and in said deed to the lands so selected there was this provision:

> "If for any reason the allotment of Eliza Bell, deceased, as described, be cancelled, set aside or held for naught and afterwards be filed at any point in the Choctaw and Chickasaw Country, then this deed and its warranties and covenants shall apply to said lands so hereafter selected, the same as if it were described in this instrument, and if it be necessary for me to hereafter execute a deed to the lands so selected I hereby covenant and warrant to the said J. S. Mullen, L. V. Mullen and W. M. Bonner, their heirs, legal representatives and assigns, that I shall so execute said deed."

And in the answer first filed it was further alleged that at the time of the execution of said deed of date, September 23, 1905, the said Malinda Pickens was a citizen of the United States and as such was entitled to all the rights and privileges of said citizenship, and that she was at that time an unrestricted Indian and that the lands described in said conveyance were unrestricted lands. It was further allegd in the answer that the lands selected were lost in contest proceedings, and that the lands described in plaintiff's petition were selected in lieu of the lands described in said deed of conveyance of date, September 23, 1905, and that by reason of the covenants of said deed of conveyance of date September 23, 1905, these defendants are entitled to a conveyance from said Malinda Pickens conveying to them the lands describ-

ed in plaintiffs said petition. It was further alleged in the answer that Frances Bell and Malinda Pickens, defendants in error here, executed a deed to one R. H. Mitchell, which deed was approved by the County Judge of Pittsburg County, Oklahoma, on the 20th day of October, 1912, the order approving same being filed of record in the office of the Register of Deeds of Grady County, Oklahoma, on November 7, 1912, and recorded in book 104, at page 114; and that by reason of which Malinda Pickens and Frances Bell were not the owners of the lands and that R. H. Mitchell was a necessary party to the suit. There was a demurrer filed to the answer and supplemental answer and cross-petition of plaintiffs in error (defendants below); which demurrer was sustained, and on the 18th day of October, 1913, judgment was entered in favor of the defendants in error and against these plaintiffs in error, which said judgment will be found on page 26 of the case-made.

Motion for a new trial was filed and overuled and exceptions saved, and the case-made was duly filed in this court after same had been settled and signed.

In the petition in error it is alleged as error:

First: That the court erred in sustaining a demurrer to the answer and cross-petition of the plaintiffs in error, which was excepted to at the time;

Second: That the judgment of the trial court was contrary to the law;

Third: That the court erred in rendering judgment against these plaintiffs in error for the reason that the answer filed by them shows that the said Frances Bell and Malinda Pickens had sold the land sued for by them to one R. H. Mitchell, which is shown in paragraph 5 of their said answer and cross-petition (Transcript pages 18 and 21.)

Fourth: That the court erred in rendering judgment against these plaintiffs in error without any testimony being offered to support the allegations of the petition of the defendants in error, which was excepted to by the plaintiffs in error at the time.

The Supreme Court of the State of Oklahoma, upon hearing said petition in error affirmed the decision of the District Court of Grady County, Oklahoma, for opinion of court see pages..... to ..... inclusive, transcript of record herein. Thereupon the plaintiffs filed their petition for writ of error, as shown on pages 3 to 6, inclusive of transcript, and their assignment of errors as shown on pages 6 and 7 of the transcript, and thereafter writ of error was duly allowed as shown on page 9 of the transcript, and this case is now before this Court.

SPECIFICATION OF ERRORS

Plaintiffs in error assign as error in the Supreme Court of Oklahoma in its final judgment and decree, the following:

First: "The Supreme Court of the State of Oklahoma erred in its construction of section 22 of the Act of Congress of 1902, ratified by treaty September 25th, 1902 (35 Stat a L.....) wherein said Supreme Court of the State of Oklahoma held that the deed executed by the defendants in error herein was insufficient to convey the lands selected in lieu of the lands described in said conveyance, for that under said deed so executed and by reason of said Section 22 of the Act of Congress ratified September 25, 1902, the lands so selected in allotment were inalienable and the heirs who inherited the said lands, and being the defendants in error herein, were unrestricted in their right of alienation of said lands, and under said conveyance so executed by said heirs, they, the said defendants in error being citizens of the United States, without restraint as to this character of land, they, the said defendants in error, Malinda Pickens and Frances Bell, had a lawful right to convey any land that might be selected in lieu of the lands described in said conveyance." (Transcript pages 6 and 7.)

We do not intend to urge the other assignments of error.

BRIEF AND ARGUMENT

We beg to call the Court's attention to the answer of the plaintiffs in error as filed in the trial Court, as shown on pages 18 and 19 of the transcript. Now the facts involving this are about as follows: F. A. Bonner,

administrator of the estate of Frances Bell, deceased, made a selection of lands in Section 31, Township 2 South, Range 1 East, and in Section 6, Township 3 South, Range 7 East, and after selection Malinda Pickens executed a warranty deed to the lands thus selected to the platintiffs in error, J. S. Mullen, L. V. Mullen and W. M. Bonner. This deed had the following covenants in it:

> "That I further warrant and covenant with the said J. S. Mullen, L. V. Mullen and W. M. Bonner that if for any reason the allotment of said Eliza Bell, deceased, as described, be cancelled, set aside and held for naught, and afterwards be filed at any point in the Choctaw or Chickasaw country, that this deed and its warranties and covenants shall apply to said lands so hereafter selected the same as if it were described in this instrument, and if it be necessary for me to hereafter execute a deed to the land so selected I hereby covenant and warrant to the said J. S. Mullen, L. V. Mullen and W. M. Bonner, their heirs, legal representatives and assigns, that I will so execute said deed." (See transcript commencing at bottom of page 6.

Now it is further shown that the lands first selected were lost in contest and that the lands involved in this suit were selected in lieu of the lands first selected, and it is our contention that the above quoted covenants entitle the plaintiffs in error here to a conveyance to the lands selected in lieu of the lands first selected. It is the contention of the defendants in error that this contract or agreement for a deed having been made prior to a se-

lection of the lands in controversy that the same is in contravention of the Federal statutes and void.

We realize the fact that this court has passed upon the question where an Indian made a deed before selection, and held the same void, the two cases holding this being that of I. P. Bledsoe vs. Wortham et al, 35 Okla., page 261, and Lynch vs. Franklin, 130 Pac. 599 36 Okla., page ....., which latter case has been affirmed by the Supreme Court of the United States, but we feel and believe that there should be a distinction made between the case at bar and the two cases cited, *supra*, in this, that under Section 22 of the Supplemental Treaty between the Chickasaws and Choctaws (32 St. at Large, 641), where an Indian died before selection his heirs took the lands as a grant direct from the Government, and by reason of which the heirs could convey the land to be selected, and when selected, by the doctrine of relation, the lands thereafter selected would inure to the benefit of the grantee. Just as Justice Williams said in the Bledsoe-Wortham, case *supra*:

> "The question of constructive allotment, or where the party had done everything reasonably within his power to select an allotment, by making application, etc., but being wrongfully refused, etc., is not in this case, and as to such probable exception we express no opinion."

In the case of Mann vs. Wilson, 23 Howard, 457 (16

L. Ed, 584), we have a case to which we invite the court's careful attention, as, in our judgment the case is identical with the case at bar. There the Indian conveyed by warranty deed certain sections of land before the same were surveyed, or platted, or selected, but which were afterwards selected and set apart to the Indian; the Indian then died and a controversy arose between the heirs of the Indian and the grantee of the Indian before selection, and the Supreme Court of the United States upheld the first deed. The same doctrine laid down in the Mann-Wilson case, will be found in Crews vs. Burcham, 1 Black, 352 (17 L. Ed., 91); Jones vs, Meehan, 175 U. S., page 1 (44 L. Ed., page 49); and now in the case of Mullen-Jansen vs. U. S. 224 U. S., 448 (56 L. Ed., 834), the Supreme Court, in our judgment, reafffirmed the same doctrine in a Chickasaw-Choctaw case, wherein it was held that where the Indian died before selection of the lands, the heirs are entitled to same as a grant direct from the government, and direct from the government to such heirs, and that under these conditions the land the heirs are entitle to is in the nature of an estate in expectancy, and the heirs being unrestricted as to this land as so held in the Mullen—Jansen vs. United States case, *supra*,) they could convey the land or make any contract for a conveyance, although no selection had been made, and that when the selection is made, by the doctrine of relation, the title subsequently acquired would inure to the benefit of the grantee. On page 841 of the Law Edition, *supra*, in the case of Mullen-Jansen

vs the United States, the Supreme Court of the United States said:

> "And there was no restriction in cases under paragraph 22 upon alienation of the lands prior to the date of the patent. There was undoubtedly a complete equitable interest which, in the absence of restriction, the owner could convey."

Citing Mann vs. Wilson; Crews vs. Burcham; Jones vs. Meehan, *supra*. So this court will see that the Supreme Court of the United States cites the Mann vs. Wilson case, and the others, in support of the doctrine we are insisting upon here. See also 62 U. S., 228; 85 U. S., 805; 99 U. S., 324; 20 Wallace, 590; 46 Ark., 285; 50 Ark., 141; 14 Minn., 544.

This proceeding was one in equity and, as we have always understood the rule in equity proceedings. the court looks to the intention of the parties. In the case at bar the pleadings disclose that it was the intention of the defendants in error to convey the title to the lands that might be allotted in the name of the deceased allottee, whether it be the particular lands described in the deed or lands to be thereafter selected in lieu thereof. In other words, it was the intention of the defendants in error to convey the landed estate in expectancy of Eliza Bell, deceased. This being their intention a court of equity should enforce the same. In 26 Calf., page 110, it is said:

"The acts of the parties showing their own construction may be considered by the court in construing a deed of doubtful import."

This case is cited with approval in re Stineback vs. Stewart,, 11 Wallace, 576. See also Hamm vs. San Francisco, 17 Federal, 119.

In 35 N. W.., at page 862, syllabus 3 is as follows:

"It is a cardinal rule of construction to ascertain and give effect, if practicable, to the intention of the parties, as gathered from the language of a deed, the situation of the parties and the subject matter. All parts of the instrument are to be construed together and the construction is to be upon the whole if the different parts can stand together. The words of the deed are to be taken as the grantor's and any ambiguity or uncertainty is to be resolved in favor of the grantee, but technical rules of construction are not to be so applied as to defeat the manifest intention of the parties."

See also Driscoll vs. Green, 59 N. H.., and Johnson vs. Simpson, 36 N. H., page 91.

In the 150 Federal, at page 17, it is said:

"The intention of the parties, when manifest or where ascertained from the written agreement, must control and be enforced without regard to inapt expressions or dry words of the contract, unless that intention is directly contrary to the plain sense of the binding words of the agreement."

See also 173 Federal, 855; 145 Fed., 144; 141 Fed., 563; 104 Fed., 457, also page 121; 76 Fed., 118; 58 Fed., 437; 34 L. R. A., 477. In the 173 Fed., 855, it is said:

> "Where the language of an agreement is contradictory, obscure or ambiguous, or where its meaning is doubtful so that the contract is fairly susceptible of two constructions, one of which makes it fair, customary and such as a prudent man would naturally execute, while the other makes it inequitable, unusual, or such as a reasonable man would not likely enter into, the interpretation which makes a rational and probable agreement must be preferred to that which makes it unusual, unfair or an improbable contract."

See also 121 Fed., 609; 19 Fed., 727; 71 Wis., 177; 108 N. Y., 288.

In the case of Prentice vs. Stearn, 113 U. S., 435 (28 L Ed., 1029), syllabus 2 reads as follows:

> "In an action at law to recover possession of land, if the deed under which the plaintiff claims title is not effectual to convey the land by reason of a mistaken description, although equity will relieve the plaintiff by reforming the deed, *yet such relief can only be had in a suit in equity, brought for that purpose.*"

See also Prentice vs. N. P. Ry., Co., 38 L. Ed., 947; 154 U. S., 173.

Now, if the court please, we invite the court's careful attention to these last three cases, for we feel that this court will distinguish the case at bar from the Bledsoe-Wortham case and the Lynch-Franklin case. And from the three cases cited, *supra*, this court can but decree a specific performance of covenants contained in the deed to these plaintiffs in error. In the case of Foxcroft vs. Melette, 45 U. S. (4 Howard, 376), it is said:

> "The deed is if possible, to be made operative in some way and the constructions should be liberal in order to affect an object and enforce the original design."

See also People vs. Starns, 97 N. Y., 366. In the case of the United States vs. Arendo, 31 U. S. (6 Peters, 740), it is said:

> "Deeds are to be read in the light of the circumstances existing at the time of their execution."

See also 2nd Devlin on Deeds, Section 839; 1st Greenleaf on Evidence, Sections 278, 288.

At this time we wish to call the court's attention to the fact that the contract for a deed, embodied in the warranty deed of the defendants in error to the plaintiff's in error, was made at a time when they had a lawful right to make such a contract. We challenge the defendants in error to cite us a single case to the contra-

ry, and we challenge the defendants in error to cite us a statute prohibiting the making of such a contract for a deed; and if there be no statute prohibiting the making of such a contract, why should not the same be enforced the same as the contract of any other citizen of the United States? The plaintiffs in error, when they took their deed, realized the fact that for some reason the lands conveyed to them might be lost in contest proceedings, and by reason of which the provision was made in the deed for the purpose of protecting them in the event of such contingency. Now, if it was the intention of the defendants in error to convey the estate of Eliza Bell, why should not this court decree a performance of the contract?

In the case of Orient Mutual Insurance Company vs. Wright, 68 U. S., (1st Wallace, 456), it is said:

> "Deeds between private persons are to be construed against the grantor and favorable to the grantee, so that of two constructions, one of which will defeat the deed and the other make it effectual, the latter is to be taken as the true construction."

See also Garrison vs. United States, 74 U. S. (7 Wallace 688); Norman vs. Bradley, 76 U. S. (9 Wallace, 394); Carter vs. Mann, 18 Minn., 96; Esty vs. Baker, 79 Am. Dec., 616.

We respectfully submit that this case should be re-

versed and a judgment here entered decreeing a specific performance of the contract embodied in the deed of the defendants in error, as of date, September 23, 1905.

Respectfully submitted,

F. R. ELLIS,

F. M. ADAMS,

Attorneys for Plaintiff in Error.

(25,812)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

No. 146.

L. V. MULLEN AND J. S. MULLEN, PLAINTIFFS IN ERROR,

vs.

ANDERSON GARDNER AND PHELIN GARDNER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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1 *Return to Writ.*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Oklahoma, in the City of Oklahoma City, this 2nd day of March, 1917.

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk Supreme Court of Oklahoma.

2 Filed in Supreme Court of Oklahoma Mar. 2, 1917. William M. Franklin, Clerk.

In the Supreme Court of the United States, Sitting at Washington, D. C.

No. 6240.

L. V. MULLEN et al., Plaintiffs in Error,

vs.

ANDERSON GARDNER et al., Defendants in Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Anderson Gardner and Phelin Gardner, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Oklahoma, wherein L. V. Mullen and J. S. Mullen are plaintiffs in error, and Anderson Gardner and Phelin Gardner are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Oklahoma this 27 day of February, 1917.

J. F. SHARP,
Chief Justice.

Attest:

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN, *Clerk,*
By N. C. ORR, *Ass't.*

We, the undersigned attorneys of record for the defendants in error in the above entitled cause hereby acknowledge service of the above citation. March 1st, 1917.

WOMACK & BROWN,
R. C. MARTIN,
Attys. for Defts. in Error.

3 Filed in Supreme Court of Oklahoma Feb. 27, 1917. William M. Franklin, Clerk.

In the Supreme Court of the United States, Sitting at Washington, D. C.

No. —.

L. V. MULLEN et al., Plaintiffs in Error,

vs.

ANDERSON GARDNER et al., Defendants in Error.

Petition for Writ of Error.

To the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, and the Associate Justices of said Court:

Now Come the plaintiffs in error, L. V. Mullen and J. S. Mullen, who were plaintiffs in error in the Supreme Court of the State of Oklahoma, and respectfully show unto this Honorable Court:

That heretofore, to-wit, on the 12th day of October, 1912, there was filed in the District Court of Stephens County, Oklahoma, by these plaintiffs in error, who are citizens of the State of Oklahoma, against the defendants in error, Anderson Gardner and Phelin Gardner, their petition wherein it was alleged that the plaintiffs in error had the legal title and were in the actual possession of the following described lands, to-wit:

4 N. W./4 of S. E./4 of Section 7 Twp. 5 South, Range 2 East, and the S. E./4 of S. W./4 of N. W./4 of Section 25, Tp. 1 South, Range 2 West, and S. E/4 of N. W./4 of S. E./4 and N./2 of N. W. /4 of S. W./4 of N. E./4 of Section 23, Tp. 8, South, Range 2 West, and North 19.97 acres of Lot 1, and S. W. 10 acres

of Lot 2, and N. W./4 of S. W./4 of N. E./4 and S. E./4 of N. E/4 of Section 4, Tp. 3, North, Range 7 West, and N. W./8.36 acres of Lot 17, of Section 18, Tp. 4 North Range 7 West, and N. W./4 of S. W./4 of S. E./4 of Section 3, Tp. 5, South, Range 2 East, and N. E./4 of N. W./4 of S. W./4 of Section 8, Tp. 5 South Range 7 East; and S. W./4 of N. E./4 of S. E./4 of Section 34, Tp. 4 South, Range 2 East, and S. 20.06 acres Lot 3 and N. 20.06 acres Lot 4 of Section 7, Tp. 1 North Range 5 West, and the S./2 of N. E./4 of S. E./4 and S. E./4 of S. E./4 of Sec. 12 Tp. 1, North, Range 6 West, same being the allotment of Wilkin Gardner, deceased; their title to said property being derived as follows: That the lands above described were allotted to and in the name of Wilkin Gardner, a Choctaw by blood, Roll Number 3710; which said allotment was made by an administrator as is provided in Section 22 of the Supplemental Treaty between the Chickasaws and Choctaws and the United States, ratified by Act of Congress September 25, 1902. That said Wilkin Gardner left surviving him as his sole and only heirs the defendants in error herein, who inherited the allotment of said Wilkin Gardner, deceased; and it was alleged in said petition that copies of the patents were regularly issued and delivered covering said lands, and said patents were attached to the petition filed in the trial court.

5 It was further alleged in the petition in the trial court that on the 6th day of January, 1906, the defendants in error, for a good and valuable consideration, made, executed and delivered their warranty deed covering the following described lands, to-wit:

The E./2 of N. W./4 of S. E./4 and S./2 of N. E./4 and N. E./4 of S. E. /4 and N./2 of N. W./4 of S. E./4 and S. E./4 of N. W./4 of S. E./4 and N. E./4 of S. W./4 of Section 6, Tp. 3, South, Range 1 East.

And in said conveyance the following covenants and warranties were included therein:

"And if for any reason the lands as hereinbefore described and filed upon and selected and allotted to the said Wilkin Gardner, should be adjudged by any tribunal now in existence, or that might be hereinafter created, not to be the lands of the said Wilkin Gardner, then and in that event the administrator who made the first selection or his successors shall file upon and select other lands of equal value of those described herein; and all the warranties and covenants herein shall extend to and cover said land so selected and filed upon and allotted, and this conveyance shall extend to and convey all such land, and, if, for any reason, it should be necessary for another deed to be executed in order that a title in fee simple may pass to the grantees, then, and in that event, we do for ourselves, our heirs, executors and administrators, represent and warrant unto the said Grantees,

6 their heirs and assigns, that we will execute such a deed conveying the same as aforesaid."

which said conveyance was regularly recorded in the office of the recording district in which the land was situated.

It was further alleged in the petition filed in the trial court that the lands first selected in allotment by the administrator was lost in contest proceedings, and that thereafter the administrator selected other lands in lieu thereof, and that the said second selection of land was in lieu of all other lands that the said Wilkin Gardner, deceased, was entitled to take and receive by reason of being a member of the Choctaw Tribe of Indians and entitled to an allotment of land by reason thereof; and it was further alleged that the plaintiffs in error immediately went into possession of said lands after said second selection was made. It was further alleged that patents were regularly issued to the lands noted above as being the second selection, and that the patents were attached to the petition in the trial court.

It was further alleged in the petition in the trial court that the defendants in error were seeking to sell and convey said lands to other parties, and that they had refused to execute a warranty deed covering such second selection to these plaintiffs in error; and it was further alleged that if the said defendants in error were permitted to execute conveyances to parties other than the plaintiffs in error, that said conveyances would be placed of record and would be a cloud upon the title of the plaintiffs in error, and by reason of which the plaintiffs in error ask that the said defendants in error be enjoined and restrained from executing any conveyance to any person other than the plaintiffs in error.

7 The prayer of the petition was for an injunction restraining the defendants in error from executing the deed covering the lands covered by the second selection to any parties other than the plaintiffs in error; and that the defendants in error be decreed by the judge of the court to convey to the plaintiffs in error the lands mentioned herein as the second selection, and that the court require by proper order the execution of such conveyances as would be necessary to convey the legal and equitable title to said second selection to the plaintiffs in error.

To the petition filed in the trial court the defendants in error filed their demurrer, which was overruled; and thereupon the defendants in error filed their answer, admitting the statements contained in the plaintiffs' petition, but assert in their answer that the conveyance under which plaintiffs in error assert their title was in contravention of the Federal Acts of Congress, and the Treaties between the Chickasaws and Choctaws and the United States, and more in particular the Act of Congress of 1898, commonly known as the "Atoka Agreement"; and also the Act of Congress ratified September 25, 1902, commonly known as the "Supplemental Treaty", between the Chickasaws and Choctaws and the United States. A trial was had and a judgment was rendered in favor of the defendants in error, and thereupon the case was regularly appealed to the Supreme Court of the State of Oklahoma; and on the 11th of April, 1916, the Supreme Court of the State of Oklahoma rendered its final judgment, whereby the judgment of the trial court was affirmed.

8 Plaintiffs in error would further respectfully represent and state unto this Honorable Court that in the trial of this cause in the District Court of Stephens County, Oklahoma, and in the Supreme Court of the State of Oklahoma, which said Supreme Court of the State of Oklahoma is the Court of Last Resort in the State of Oklahoma, and that in the record and proceedings and transcript, to which a reference is here made, manifest error occurred and was committed by the said Supreme Court of the State of Oklahoma, to the damage of the plaintiffs in error herein, L. V. Mull and J. S. Mullen, whereof they feel themselves aggrieved.

Plaintiffs in error would further respectfully represent and state to this Honorable Court that in the record, proceedings and transcript it will appear that there was drawn in question the construction of the Supplemental Treaty between the Chickasaw and Choctaw Nations and the United States of America Section 22 thereof (32 Statutes at Large 641); also the construction of what is commonly known as the "Atoka Agreement" which is the Act of Congress of June 28th, 1908, (30 Statutes at Large 495); and also the Act of Congress of April 26, 1906, (— Statutes at Large —).

Plaintiffs in error would further respectfully represent and state to this Honorable Court that it was necessary to construe said Acts of Congress and Treaties aforesaid by the Supreme Court of the State of Oklahoma, in order to render the final decree and judgment that was rendered herein.

9 Wherefore, your petitioners, feeling themselves aggrieved by said judgment of said Supreme Court of the State of Oklahoma, appeal from said judgment, and the whole thereof, upon the reasons specified in the assignment of errors filed herein; and pray that the appeal may be allowed; that a writ of error be allowed and granted, and that the said final decree and judgment, all pleadings, mandate, orders, transcript, record and other proceedings had in said cause may be transmitted to the Supreme Court of the United States, to the end that this Honorable Court may hear said cause anew, and that the judgment of the said Supreme Court of the State of Oklahoma may be reversed, and that a decree may be entered herein remanding said cause for further proceedings in the court below, or that such decree may be made as to this Honorable Court may seem just and proper.

H. A. LEDBETTER AND
F. M. ADAMS,
Attorneys for Plaintiffs in Error.

10 Filed in Supreme Court of Oklahoma Feb. 27, 1917. William M. Franklin, Clerk.

In the Supreme Court of the United States, Sitting at Washington, D. C.

No. —.

L. V. MULLEN et al., Plaintiffs in Error,

vs.

ANDERSON GARDNER et al., Defendants in Error.

Assignment of Errors.

Plaintiffs in error, L. V. Mullen and J. S. Mullen, complaining of the defendants in error, Anderson Gardner and Phelin Gardner, state that in the Supreme Court of the State of Oklahoma, a final decree and judgment was rendered against these plaintiffs in error, and in favor of the defendants in error herein, and from which said judgment plaintiffs in error have appealed to this Honorable Court; and a writ of error having been issued, signed by the United States District Clerk for the Western District of Oklahoma, and the Honorable J. F. Sharp, Chief Justice of the Supreme Court of the State of Oklahoma;

11 Now, therefore, the premises considered, the plaintiffs in error, L. V. Mullen and J. S. Mullen, assign as error of the Honorable Supreme Court of the State of Oklahoma the following:

First. The Supreme Court of the State of Oklahoma erred in its construction of Section 22 of the Act of Congress of 1902, ratified by Treaty September 25, 1902, (32 Statutes at Large —) wherein said Supreme Court of the State of Oklahoma held that the deed executed by the defendants in error herein was insufficient to convey the lands selected in lieu of the lands described in said conveyance, for that under said deed so executed and by reason of said Section 22 of the Act of Congress ratified September 25, 1902, the lands so selected in allotment were alienable and the heirs who inherited said lands, and being the defendants in error herein, were unrestricted in their right of alienation of said lands, and under said conveyance so executed by said heirs, they, the said defendants in error, being citizens of the United States, without restraint as to this character of land, they, the said defendants in error, Anderson Gardner and Phelin Gardner, had a lawful right to convey any land that might be selected in lieu of the lands described in said conveyance, and that the said defendants in error had a right to contract to convey any lands that might have been selected in lieu of the lands described in said conveyance.

12 Second. The Supreme Court of the State of Oklahoma erred in holding that the defendants in error could not convey and could not contract to convey land not selected in allotment,

although the said defendants in error are shown by the record herein to be citizens of the United States; and, although the record shows that the said defendants in error had selected their own allotments, for that, the lands involved in this controversy were lands inherited by the said defendants in error under said Section 22 of said Act of Congress of September 25, 1902.

And these plaintiffs in error say that by said conveyance so executed by the defendants in error to these plaintiffs in error, the estate conveyed by them to these plaintiffs in error is, and was, an estate of expectancy.

Third. The Supreme Court of the State of Oklahoma erred in holding that the deed and contract to convey executed by the defendants in error to the plaintiffs in error herein were void.

For all of which reasons plaintiffs in error pray that this cause be reversed, and that they have all other relief to which they may be entitled.

H. A. LEDBETTER AND
F. M. ADAMS,
Attorneys for Plaintiffs in Error.

13 Filed in Supreme Court of Oklahoma Feb. 28, 1917. William M. Franklin, Clerk.

In the Supreme Court of the United States, Sitting at Washington, D. C.

No. —.

L. V. MULLEN et al., Plaintiffs in Error,

vs.

ANDERSON GARDNER et al., Defendants in Error.

The President of the United States of America to the Honorable J. F. Sharp, Chief Justice of the Supreme Court of the State of Oklahoma, and the Associate Justice of said Court, and to the Clerk of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record of the proceedings as *was* in the rendition of the judgment of a proceeding which is in the Supreme Court of the State of Oklahoma, before you being the highest Court of law and equity in which a decision can be had *had* in said suit between L. V. Mullen and J. S. Mullen as plaintiffs in error, and Anderson Gardner and Phelin Gardner as defendants in error, wherein a final decree and judgment was rendered in said cause in favor of the defendants in error, quieting the title to that portion of the allotment of Wilkin Gardner, deceased, in the defendants in error, designated and commonly known as the allotment of Wilkin Gardner, deceased, and cancelling of record the conveyances of the plaintiffs in error, who sought to derive their title from the said defendants in error herein, and adjudging that these

14 plaintiffs in error take nothing by said petition in error, and wherein in said judgment of the said Supreme Court of the State of Oklahoma there was drawn in question the construction of said Acts of Congress and certain Treaties between the Chickasaws and Choctaws and the United States, and by said judgment aforesaid of the said Supreme Court of the State of Oklahoma it was necessary for the Supreme Court of the State of Oklahoma to construe said Acts of Congress and Treaties aforesaid, in order to render judgment therein, and it appearing that manifest error has happened to the damage of the plaintiffs in error, as well as by their petition and assignment of errors appears; and we being willing that the error, if any hath been committed, should be duly and speedily corrected, and full justice done between the parties in this behalf, do command that if judgment therein be given, that then under the seal distinctly and openly you send a copy of the record of the proceedings aforesaid with all things concerning *to* them, duly authenticated and verified, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., to the Supreme Court of the United States within Thirty (30) days of the date hereof, that said record of said proceedings aforesaid be inspected by the Supreme Court of the United States, and may cause further to be done therein to correct that error what, of right and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States this, the 28 day of February, 1917.

[Seal of the United States District Court, Western District of Oklahoma.]

ARNOLD C. DOLDE,
Clerk of the District Court of the United States for the Western District of Oklahoma.

Allowed:

J. F. SHARP,
Chief Justice.

15 Filed in Supreme Court of Oklahoma Feb. 27, 1917. William M. Franklin, Clerk.

In the Supreme Court of the United States Sitting at Washington, D. C.

No. 6240.

L. V. MULLEN et al., Plaintiffs in Error,

vs.

ANDERSON GARDNER et al., Defendants in Error.

Order Fixing Amount of Bond.

The bond to supersede the judgment rendered herein is hereby fixed at the sum of $1000.00, and which said bond is executed to Anderson Gardner and Phelin Gardner, defendants in error herein, in said amount and approved; the same to act as supersedeas this the 27 day of February, 1917.

J. F. SHARP,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:

[Seal Supreme Court, State of Oklahoma.]

W. M. FRANKLIN,
Clerk of the Supreme Court,
By N. C. ORR, *Ass't.*

16 Filed in Supreme Court of Oklahoma Mar. 1, 1917. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

6240.

L. V. MULLEN, Plaintiff in Error,

vs.

ANDERSON GARDNER et al., Defendants in Error.

Bond.

Know all men by these presents: That we, L. V. Mullen, as principal, and J. S. Mullen and E. Dunlap, as sureties are held and firmly bound unto Anderson Gardner and Phelin Gardner in the sum of one thousand dollars ($1000.00) to be paid to said obligees,

their successors, assigns, heirs, executors or administrators, to the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed and dated this 26th day of February, A. D., 1917.

Whereas, the above named plaintiff in error hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Oklahoma.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute his writ of error to effect, and answer all costs and damages if he shall fail to make good his plea then this obligation shall be void; otherwise to remain in full force and effect.

L. V. MULLEN, *Principal,*
By LEDBETTER & ADAMS,
His Attorneys.
J. S. MULLEN,
E. DUNLAP, *Sureties.*

STATE OF OKLAHOMA,
County of Carter, ss:

J. S. Mullen and E. Dunlap, being each first duly sworn, each upon oath state, that they are the sureties who signed the
17 above and foregoing bond, and that they and each of them are worth more than the sum of one thousand dollars, above all debts, liabilities, and exemptions allowed them by law, and that they have property subject to execution of the value of more than one thousand dollars situated in the State of Oklahoma.

J. S. MULLEN.
E. DUNLAP.

Subscribed and sworn to before me, this February 26, 1917.
[SEAL.] B. S. GARDENHIRE,
Notary Public.

My Commission expires 19 day of Nov., 1919.

I hereby approve the foregoing bond and sureties to operate as a supersedeas, this 1st day of March, 1917.

J. F. SHARP,
Chief Justice of the Supreme Court of the State of Oklahoma.

18 (Filed in District Court Apr. 2, 1914. M. J. Davis, Clerk. F. Frensley, Deputy.)

In the Supreme Court of the State of Oklahoma at Oklahoma City.

No. 6240.

L. V. MULLEN et al., Plaintiffs in Error,

vs.

ANDERSON GARDNER et al., Defendants in Error.

(Filed Apr. 6, 1914. W. H. L. Campbell, Clerk.)

Petition in Error.

Plaintiff in Error, L. V. Mullen, and J. S. Mullen, complaining of the defendants in error Anderson Gardner and Phelin Gardner state that heretofore to wit on the 4th day of November, 1913, in the District Court of Stephens County, Oklahoma, the defendants in error, Anderson Gardner and Phelin Gardner, recovered judgment against the plaintiffs in error, L. V. Mullen and J. S. Mullen for the following described land, to wit: South 20.06 — of Lot 3 of sec. 7, twp. 1 North, Range 5 West and North 20.06 acres of Lot 4 of section 7, twp. 1 North, Range 5 West and S./2 N. E./4 S. E./4 sec. 12, twp. 1 North Range 6 West and S. E./4 S. E./4 sec. 12, twp. 1 North, Range 6 West and N. W./4 S. E./4 S. E./4 sec. 7, twp. 5 South, Range 2 East and S. E./4 S. W./4 N. W./4 sec. 25, twp. 1 South, Range 2 West and S. E./4 N. W./4 N. E./4 sec. 23, twp. 8 South, Range 2 West and N./2 N. W./4 S. W./4 N. E./4 sec. 23, twp. 8 South Range 2 West and North 19.97 acres of Lot 1 of section 4, twp. 3 North, Range 7 West and S. W. 10 acres of Lot 1 of sec. 4, twp. 3 North, Range 7 West and N. W./4 S. W./4 N. E./4 sec. 4 twp. 3 North Range 7 West and S. W./4 10 acres of Lot 2 of section 4 twp. 3 North Range 7 West and N. W. 8.36 acres of Lot 17
19 of section 18, twp. *of section 18, twp.* 4 North Range 7 West, and also judgment cancelling of record in the office of the Register of Deeds of Stephens County, Oklahoma, certain conveyances in favor of the plaintiffs in error from heirs of a deceased Indian, which heirs were unrestricted in their right to alienate as well as their right to contract, the original case made and transcript being hereto attached, made a part hereof and marked exhibit "A," and these plaintiffs in error say there is error in said record, judgment and procedings, for the following reasons, to wit:

First. The trial court erred in overruling the motion of the plaintiffs in error for a new trial.

Second. The trial court erred in refusing judgment upon the opening statement which was excepted to at the time.

Third. The trial court erred in holding that the heirs of a de-

ceased Indian who had inherited lands of the Chickasaw-Choctaw Nations under section 22 of the Supplemental Treaty of September 25th, 1902, could not alienate such lands so inherited, and erred in holding that an agreement to convey such lands so inherited before selection was violative of the Treaties between the Chic-asaws and Choctaws and the United States and other laws of the United States, and the trial court erred in refusing to hold valid such a conveyance in favor of the plaintiffs in error.

Fourth. The trial court erred in refusing to sustain certain
20 objections made by the plaintiffs in error which was excepted to at the time.

Fifth. The trial court erred in permitting the defendants in error to introduce certain testimony, over the objections of the plaintiffs in error, which was excepted to at the time.

Sixth. The judgment of the trial court is contrary to the law.

Seventh. The judgment of the trial court is contrary to the evidence.

Eighth. The judgment of the trial court is contrary to the law and the evidence.

For all of which reasons, the plaintiffs in error pray that the judgment of the trial court be reversed and judgment be rendered here for the plaintiffs in error.

H. A. LEDBETTER,
Atty. for Plffs. in Error.

Filed in District Court Apr. 2, 1914. M. J. Davis, Clerk, by F. Frensley, Deputy.

21 (Filed Apr. 6, 1914. W. H. L. Campbell, Clerk.)

(Filed in District Court Apr. 2, 1914. M. J. Davis, Clerk, By F. Frensley, Deputy.)

In the Supreme Court of Oklahoma.

L. V. MULLEN et al., Plaintiffs in Error,

vs.

ANDERSON GARDNER et al., Defendants in Error.

Appealed from the District Court of Stephens County, State of Oklahoma.

Honorable Frank M. Bailey, Trial Judge.

Appearances:

For Plaintiffs in Error: Mr. H. A. Ledbetter, Ardmore, Oklahoma.

For Defendants in Error: Womack & Brown, Duncan, Oklahoma, and R. C. Martin, Idabel, Oklahoma.

Case-made.

EXHIBIT "A."

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23 And be it remembered, that on the 12th day of October, 1912, the Plaintiffs, J. V. Mullen and J. S. Mullen, filed in the office of the Clerk of the District Court of Stephens County, State of Oklahoma, their Petition against the defendants Wilson Gardner, Nancy Gardner and Anderson Gardner, said Petition of the plaintiffs being in words and figures as follows, to-wit:

"In the District Court within and for Stephens County, Oklahoma.

No. 1069.

L. V. MULLEN and J. S. MULLEN, Plaintiffs,

vs.

WILSON GARDNER, NANCY GARDNER, and ANDERSON GARDNER, Defendants.

Petition.

Now comes the plaintiffs, L. V. Mullen and J. S. Mullen, and complaining of the defendants Wilson Gardner, Nancy Gardner and Anderson Gardner, and with respect shows to the Court: that the plaintiffs herein are residents of Carter County, Oklahoma, and that the defendants are residents of McCurtain County, Oklahoma, and that the lands hereinafter described are located within Stephens County, Oklahoma, and within the jurisdiction of this Court.

For cause of action Plaintiffs state:

1. That the plaintiff is the legal owner in fee simple, and in the actual, peaceable and exclusive possession of the following described premises, situated in Stephens County, Oklahoma, Carter County, Oklahoma, Marshall County, Oklahoma, and Love County, Oklahoma, to-wit:

N. W./4 of S. E./4 of Section 7 Twp. 5 South, range 2 East, and the S. E./4 of S. W./4 of N. W./4 of Section 25, tp. 1 south, range 2 west, and S. E./4 of N. W./4 of S. E./4 and N./2 of N. W./4 of

S. W./4 of N. E./4 of Section 23, tp. 8, South range 2 West and North 19.97 acres of Lot 1, and S. W. 10 acres Lot 1, and S. W. 10 acres of Lot 2, and N. W./4 of S. W./4 of N. E./4 and S. E./4 of S. E./4 of N. E./4 of Section 4, tp. 3, north range 7 west, and N. W./ 8.36 acres of Lot 17, of Section 18, tp. 4 North range 7 West, and N. W./4 of S. W./4 of S. E./4 of Section 3, tp. 5, south ra*gne* 2 east, and N. E./4 of N. W./4 of S. W./4 of Section 8, tp. 5
24 south range 7 east; and S. W./4 of N. E./4 of S. E./4 of Section 34, tp. 4 south range 2 east, and S. 20.06 acres Lot 3 and N. 20.06 acres Lot 4 of Section 7, tp. 1 north range 5 west, and the S./2 of N. E./4 of S. E./4 and S. E./4 of S. E./4 of Sec. 12, tp. 1, North range 6 west, same being the allotment of Wilkin Gardner, deceased.

That plaintiffs derive their title to said premises as follows:

2. That the lands described in paragraph one of this petition were allotted to and in the name of Wilkin Gardner, Choctaw by Blood, Roll No. 3710, after his death. That said Wilkin Gardner died on the — day of — 19— leaving surviving him as his sole and only heirs, the defendants herein Wilson Gardner, Anderson Gardner and Nancy Gardner, who inherited the allotment of the said Wilkin Gardner, deceased. Copies of said patents issued to the said Wilkin Gardner conveying the lands first described to him, and his he-rs, are hereto attached marked "Exhibits A, B, & C" respectively.

3. That heretofore, and on the 6th day of January, 1906, the defendants Wilson Gardner, Anderson Gardner and Nancy Gardner, for a good and valuable consideration, made, executed and delivered their certain deed of conveyance to the following described land, to-wit: The E./2 of N. W./4 of S. E./4 and S./2 of N. E./4 and N. E./4 of S. E./4 and N./2 of N. W./4 of S. E./4 and S. E./4 of N. W./4 of S. E./4 and N. E./4 of N. E./4 of S. W./4 of Section 6, tp. 3 south range 1 east, conveying the above described land to Mrs. Alice Mitchell, and warranted the title to the same to Mrs. Alice Mitchell, and the further covenant was contained in said deed of conveyance above mentioned "and if for any reason the
25 lands as hereinbefore described and filed upon and selected and allotted to the said Wilkin Gardner, should be adjudged by any tribunal now in exist*ance*, or that might be hereinafter created, not to be the lands of the said Wilkin Gar*nd*er, then and in that event the said Howard McBride as administrator, or his successors shall file upon and select other lands of equal value to those described herein, and all the warranties and covenants herein shall exten*t* to and cover said land *do* selected and filed upon and allotted and this conveyance shall extend to and convey all such land and if for any reason it should be necessary for another deed to be executed in order that a title in fee simple may pass to the said Mrs. Mat-ie Mitchell, then and in that event we do for ou*t*selves, our heirs, executors and administrators, represent and warrant unto the said Mrs. Mattie Mitchell, her heirs and assigns that we will execute such a deed conveying the same as aforesaid." Said deed of conveyance last above mentioned is recorded in Recording District No. 21, in Book 30, at page 409 and was so recorded on the 20th day of Jan-

uary, 1906. A copy of said deed is hereto attached marked Exhibit "D" and made a part of this petition.

4. Plaintiffs further represent that Mrs. Mattie Mitchell conveyed and sold by warranty deed the land in paragraph 3 described to Bonner & Mullen, and that said —— Bonner on the — day of ——, 19—, conveyed all of his interest in and to said land as described in paragraph 3 to the plaintiff J. S. Mullen, and that said J. S. Mullen is now the owner of said lands, and that such lands and such lands as wer- selected in lieu thereof, as hereinafter described and set forth.

26 5. Plaintiffs further represent that defendants Wilson Gardner, Anderson Gardner and Nancy Gardner, on the 6th day of January 1906, conveyed by proper warranty deed to J. S. Mullen and L. V. Mullen, all their right, title and interest in and to the following described lands, to-wit:

E./2 of N. W./4 of S. W./4 of Section 8, Tp. 5 south range 7 east and N. W./4 of S. W./4 of S. E./4 of Section 3, Tp. 5 south range 2 east and the S. W./4 of N. E./4 of S. E./4 of Section 34, Tp. 4 south range 2 east; same being a portion of the allotment of Wilkin Gardner, deceased; conveying the land in this paragraph described to J. S. Mullen and L. V. Mullen and warranting the title of the same to them, and said deed of conveyance in this paragraph mentioned further provided: "and if for any reason the lands hereinbefore filed upon, selected and allotted to said Winkin Gardner, should be adjusted by any tribunal not to be the land of the said Wilkin Gardner, then and in that event the said Howard McBride or his successor shall select, file upon and allot other lands of equal appraised value of that described in and cover said land so selected, filed upon and allotted, and this conveyance shall extend to and convey all of said land, so selected, filed upon and allotted, and that this conveyance shall extend to and cover all of said land, and if for any reason it should be necessary for another deed to be executed in order for a title in fee simple to pass to the said J. S. Mullen and L. V. Mullen, that in that event we do for ourselves, our heirs, executors and administrators represent and warrant unto the said J. S. Mullen and L. V. Mullen, their heirs and assigns, that we will execute such a deed conveying the same as aforesaid."

27 Said deed of conveyance was and is duly recorded in recording district No. 21, on the 22nd day of May, 1906, and is recorded in Book 32, on page 423 of the records thereof. A copy of said deed is hereto attached marked "Exhibit E" and made a part of this petition.

6. That the lands mentioned in paragraphs 3 and 5 of this petition were first selected and filed upon, and constituted the entire allotment of Wilkin Gardner, and that the filing on and to all of the lands mentioned in paragraph 3 was cancelled, and a portion of the lands described in paragraph one were filed upon, and allotted to Wilkin Gardner, in lieu of the lands on which his filing was cancelled, and that patents issued to Wilkin Gardner for said lands so selected in lieu of the lands on which filing were cancelled, and that by the terms of said deeds, Exhibits "D & C" hereto, all rights in and to the lands selected in lieu of the lands conveyed in para-

graphs 3 and 5, were conveyed by the deeds afore-mentioned to these plaintiffs, and all rights, title and privileges accompanying ownership inured to the benefit of these plaintiffs to all of the lands allotted to and in the name of Wilkin Gardner, deceased.

7. That these plaintiffs have been in possession of said land from before the time of filing and up to and including the present time under said deeds, aforesaid, and have been collecting the rents, revenues and profits from off the same, and enjoying all the rights of ownership to the same; and that the defendants Wilson Gardner, Anderson Gardner and Nancy Gardner are now claiming some right, title and estate in and to said lands in paragraph one men-
28 tioned by virtue of being the heirs of Wilkin Gardner, deceased. That said pretended claim of the defendants is without right as against these plaintiffs, and that said defendants have no right, title or interest in and to said lands mentioned in paragraph one, having conveyed all their right, title and interest by the deeds hereinbefore mentioned.

8. That said pretended claim of the defendants is a cloud on the title of the plaintiffs herein, and that unless the same is cancelled or set aside by this Court, the plaintiffs will suffer irreparable injury, and their title to said land will be irreparably injured.

9. That the defendants are now trying to sell and convey said lands to other parties, and that unless prevented by a restraining order from this Court will sell and convey the same, and make a deed thereto, and further cloud the title thereto, and make the title to said land unmerchantable, by reason of the various deeds thereon.

Wherefore, plaintiffs pray that the defendants, and each of them be cited to appear and answer herein as the law directs, and (1) that the defendants and each of them be enjoined and restrained from making, executing or delivering any deed, or other conveyance, or encumbrance, on the lands mentioned in paragraph one of this petition, and from disturbing this plaintiff in his possession thereof, pending the judgment herein, and that the court issue a temporary order restraining the defendants from making, executing or delivering any deed covering the lands mentioned in paragraph one of this petition pending the hearing of this cause, and (2) that the
29 defendants be decreed to convey said premises to the plaintiffs herein by warranty deed, and in default thereof by said defendants that this court require and order the sheriff of this county to make, execute and deliver to the plaintiffs a warranty deed for said defendants, conveying to the plaintiffs the property described in paragraph one of this petition, and that this court order and adjudge that the same shall be and have the same effect as if executed by the defendants in their own person, and (3) that the defendants be required to set forth the nature of their claims, if any; and that this court decree the plaintiffs' right and title to the lands described in paragraph one, being the lands allotted to Wilkin Gardner, to be valid and perfect, and that these defendants have no right, valid claim or title therein, nor any interest whatever in said premises, and that said defendants and each of them be perpetually barred and enjoined from setting up, or asserting any title, or interest in said premises adverse to this plaintiff, and for such other relief as

may be equitable and proper and for the costs of this action, and so will ever pray.

(Signed) H. A. LEDBETTER,
F. M. ADAMS,
Attorneys for the Plaintiffs.

STATE OF OKLAHOMA,
Carter County, ss:

J. S. Mullen, being first duly sworn, on oath deposes and says: that he is one of the plaintiffs, in the above and foregoing cause, and that he has read the above and foregoing petition, and that the matters, facts and things therein set forth and alleged are true.

J. S. MULLEN.

Subscribed and sworn to before me this October 9th, 1912.

[SEAL.] E. DUNLOP,
Notary Public.

My Commission expires January 11th, 1915.

Exhibit "A" attached to the foregoing petition being as follows, to-wit:

30 Choctaw and Chickasaw Nations.

Homestead Patent.

Record —.
Page —.
To —— ——.
Choctaw by Blood.
Dated (as below).
Filed —.
Homestead Patent No. 26340.
Roll No. 3710.
Date of Certificate September 9, 1910.

The Choctaw and Chickasaw Nations,

(Formerly Indian Territory), Oklahoma.

To all to whom these presents shall come, Greeting:

Whereas, By the Act of Congress approved July 1, 1902 (32 Stat., 641), and ratified by the citizens of the Choctaw and Chickasaw Nations September 25, 1902, it was provided that there should be allotted, by the Commission to the Five Civilized Tribes, to each citizen of the Choctaw and Chickasaw Nations land equal in value to three hundred and twenty acres of the average allottable lands of the Choctaw and Chickasaw Nations; and,

Whereas, it was provided by said Act of Congress that each member of said tribes shall, at the time of the selection of his allotment,

designate, or have selected and designated for him, from his allotment, land equal in value to one hundred and sixty acres of the average allot-able land of the Choctaw and Chickasaw Nations, as nearly as may be, as a homestead, for which separate certificates and patent shall issue; and,

Whereas, The said Commission to the Five Civilized Tribes, or its lawful successor, has certified that the land hereinafter described has been selected by or on behalf of Wilkin Gardner a citizen of the Choctaw Nation, as a homestead.

Now, therefore, we, the undersigned, the principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, by virtue of the Power and authority vested in us by the twenty-ninth section of the Act of Congress of the United States, approved June 28, 1898 (30 Stat., 495), have granted and conveyed, and by these presents do grant and convey unto the said Wilkin Gardner all the right title and interest of the Choctaw and Chickasaw Nations, and of all other citizens of said Nations, in and to the following described lands, viz:

The South Twenty and Six On- Hundredths (20.06) acres of Lot Three (3) and the North Twenty and Six One Hundredths (20.06) acres of Lot Four (4) of Section Seven (7), Township One (1) North, and Range Five (5) West, and the South Half of the North East Quarter of the South East Quarter and the South East Quarter of the South East Quarter of Section Twelve (12), Township One (1) North, Range Six (6) West, (Chickasaw Nation)

of the Indian Base and Meridian, in Indian Territory, containing One Hundred and Twelve One-hundredths (100.12) acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the condition provided by the Act of Congress approved July 1, 1902 (32 Stat., 641) pertaining to allotted homesteads.

In witness whereof, We, the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, have hereunto set our hands and caused the great seal of our respective Nations to be affixed at the dates hereinafter shown.

Dated Sept. 20, 1911.

[Seal of Choctaw Nation.]

VICTOR M. LOCKE, JR.,
Principal Chief of the Choctaw Nation.

Dated Sept. 18, 1911.

[Seal of the Chickasaw Nation.]

DOUGLASS H. JOHNSTON.
Governor of the Chickasaw Nation.

"Exhibit A."

Department of the Interior.

Approved Oct. 5, 1911.

WALTER L. FISHER, *Secy.*,
By M. E. NETHERLAND, *Clerk.*

Filed for record this 17 day of Oct., 1911, at 4 o'clock P. M. and recorded in Book 43, Page 461 at Muskogee.

31 Choctaw and Chickasaw Nations.

Homestead Patent.

Record —.
Page —.
To —— ——.
Choctaw by Blood.
Dated (as below).
Filed —.
Roll No. 3710.
Allotment Patent No. 33825.
Date of Certificate January 3, 1906.

The Choctaw and Chickasaw Nations,

(Formerly Indian Territory), Oklahoma.

To All to Whom These Presents Shall Come, Greeting:

Whereas, by the Act of Congress approved July 1, 1902 (32 Stat., 641) and ratified by the citizens of the Choctaw and Chickasaw Nations September 25, 1902, it was provided that there should be allotted, by the commission to the Five Civilized Tribes, to each citizen of the Choctaw and Chickasaw Nations land equal in value to three hundred and twenty acres of the average allottable lands of the Choctaw and Chickasaw Nations; and,

Whereas, it was provided by said Act of Congress that each member of said tribes shall, at the time of the selection of his allotment, designate, or have selected and designated for him, from his allotment, land equal in value to one hundred and sixty acres of the average allot-able land of the Choctaw and Chickasaw Nations, as nearly as may be, as a homestead, for which separate certificate and patent shall issue, and,

Whereas, the said Commission to the Five Civilized Tribes, or its lawful successor, has certified that the land hereinafter described has been selected by or on behalf of Wilkin Gardner, a citizen of the Choctaw Nation, as an allotment, exclusive of land equal in value to 160 acres of the average allot-able lands of the Choctaw and Chickasaw Nations, selected as a homestead as aforesaid.

Now, therefore, we, the undersigned, the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, by virtue of the power and authority vested in us by the twenty-ninth sec-

tion of the Act of Congress of the United States, approved June 28, 1898 (30 Stat., 495), have granted and conveyed, and by these presents do grant and convey unto the said Wilkin Gardner all the right, title, and interest of the Choctaw and Chickasaw Nations, and of all other citizens of said Nations, in and to the following described land, viz:

The North West quarter of the South west quarter of the south east quarter of section three (3), township five (5) south, range two (2) east and the North east quarter of the North west quarter of the south west quarter of Section eight (8), Township five (5) south, and range seven (7) east, and the south west quarter of the North east quarter of the south east quarter of Section Thirty-four (34), Township Four (4) South, and Range Two (2) East, (Chickasaw Nation) of the Indian Base and Meridian, in Indian Territory, containing Thirty (30) acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the conditions provided by the Act of Congress approved July 1, 1902 (32 Stat., 641).

In witness whereof, we the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, have hereunto set our hands and caused the great seal of our respective Nations to be affixed at the dates hereinafter shown.

Dated Sep. 20, 1911.

[Seal of Choctaw Nation.]

VICTOR M. LOCKE, JR.,
Principal Chief of the Choctaw Nation.

Dated Sep. 18, 1911.

[Seal of the Chickasaw Nation.]

DOUGLASS H. JOHNSTON.
Governor of the Chickasaw Nation.

Exhibit B.

Department of the Interior.

Approved Oct. 5, 1911.

WALTER L. FISHER, *Secretary,*
By M. E. NETHERLAND, *Clerk.*

Filed for record this 17 day of Oct., 1911, at 4 o'clock P. M. and recorded in Book 57, Page 282 at Muskogee.

32 Choctaw and Chickasaw Nations.

Homestead Patent.

Record —.
Page —.
To —— ——,
Choctaw by Blood.
Dated (as below).
Filed —.
Roll No. 3710.
Allotment Patent No. 33815.
Date of Certificate September 9, 1910.

The Choctaw and Chickasaw Nations,

(Formerly Indian Territory), Oklahoma.

To All to Whom These Presents Shall Come, Greeting:

Whereas, by the Act of Congress approved July 1, 1902 (32 Stat., 641) and ratified by the citizens of the Choctaw and Chickasaw Nations September 25, 1902, it was provided that there should be allotted, by the Commission to the Five Civilized Tribes, to each citizen of the Choctaw and Chickasaw Nations land equal to three hundred and twenty acres of the average allot-able lands of the Choctaw and Chickasaw Nations; and,

Whereas, it was provided by said Act of Congress that each member of said tribes shall, at the time of the selection of his allotment, designate, or have selected and designated for him, from his allotment, land equal in value to one hundred and sixty acres of the average allot-able land of the Choctaw and Chickasaw Nations, as nearly as may be, as a homestead, for which separate certificate and patent shall issue; and,

Whereas, the said Commission to the Five Civilized Tribes, or its lawful successor, has certified that the land hereinafter described has been by or on behalf of Wilkin Gardner, a citizen of the Choctaw Nation, as an allotment exclusive of land equal in value to one hundred and sixty of the average allot-able lands of the Choctaw and Chickasaw Nations selected as a homestead as aforesaid.

Now, therefore, we, the undersigned, the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, by virtue of the power and authority vested in us by the twenty-ninth section of the Act of Congress of the United States, approved June 28, 1898 (30 Stat., 495), have granted and conveyed, and by these presents do grant and convey unto the said Wilkin Gardner all the right, title, and interest of the Choctaw and Chickasaw Nations, and of all other citizens of said Nations, in and to the following described land, viz: The Northwest quarter of S. E. /4 of S. E. /4 of Sec. Seven (7), Twp. Five (5) South, and Range Two (2) East, and S. E. /4 of S. W. /4 of N. W. /4 of Sec. Twenty-five (25), Twp. One (1) South, and Range

Two (2) West, and S. E./4 of N. W./4 of N. E./4 and N./2 of N. W./4 of S. W./4 of N. E./4 of Sec. Twenty-three (23), Twp. Eight (8) South, and Range Two (2) West, and North Nineteen and Ninety-seven one-hundredths (19.97) acres of Lot One (1), and South west ten (10) acres of Lot One (1) and South west ten (10) acres of Lot Two (2), and North west quarter of S. W./4 of N. E./4, and S. E./4 of N. E./4 of Sec. 4, Tp. 3 N. R. 7 W. and N. W./8.36 acres of Lot 17 of Sec. 18, Tp. 4 N. R. 7 W. (Chickasaw Nation) of the Indian Base and Meridian, in Indian Territory, containing One Hundred and Three and Thirty-three one-hundredths (103.33) acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the conditions provided by the Act of Congress approved July 1, 1902 (32 Stat., 641).

In witness whereof, we, the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, have hereunto set our hands and caused the great seal of our respective Nations to be affixed at the date hereinafter shown.

Dated Sep. 20, 1911.

[Seal of Choctaw Nation.]

VICTOR LOCKE, JR.,
Principal Chief of the Choctaw Nation.

Dated Sept. 18, 1911.

[Seal of the Chickasaw Nation.]

DOUGLASS H. JOHNSTON,
Governor of the Chickasaw Nation.

"Exhibit C."

Department of the Interior.

Approved Oct. 5, 1911.

WALTER L. FISHER, *Secretary.*
By M. E. NETHERLAND, *Clerk.*

Filed for record this 17 day of Oct. 1911 at 4 o'clock P. M. and recorded in Book 57, Page 272 at Muskogee.

33 "Exhibit D."

"United States of America,
Central District,
Indian Territory:

Know all men by these presents:

That we, Wilson Gardner, Anderson Gardner, and Nancy Gardner, members and allottees of the Choctaw Tribe of Indians, and the brothers and wife respectively and the sole and only heirs of Wilken

Gardner, deceased, who died on the 9th day of December, 1905, for and in consideration of the sum of $130.30 to us in hand paid by J. S. Mullen and L. V. Mullen, the receipt of which is hereby acknowledged, *we* do, *and* by these presents give, grant, bargain, sell and convey unto the said J. S. Mullen and L. V. Mullen, their heirs and assigns, all and singular the following described lands and improvements, to-wit:

E. ½ of N. W. ¼ of S. W. ¼ of Sec. 8, Twp. 5 South Range 7 East; Also N. W. ¼ of S. W. ¼ of S. E. ¼ of Sec. 3, Twp. 5, S. Range 2 East, and the S. W. ¼ of the N. E. ¼ of S. E. ¼ of Sec. 34, Twp. 4 S. R. 2 East, Indian Meridian, Chickasaw Nation, Indian Territory,

and being a part of the land selected by Howard McBride, administrator of the estate of Wilkin Gardner, together with all and singular the improvements thereon situated, and all the right, privileges, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and all the right, title, claim and interest that the said Wilkin Gardner, in and to all and singular said lands and premises as hereinbefore described, and being a part of the identical lands as designated and shown by the records of the Commissioner to the Five Civilized Tribes, as filed upon, selected and allotted to the said Wilkin Gardner, as a member and allottee of the Choctaw Tribe of Indians, and all the right, title, claim and interest of the said Wilken Gardner, in and to all and singular any and all improvements located on said land described, and we the said Wilken Gardner, Anderson Gardner, and Nancy Gardner, the only and sole heirs of the said Wilken Gardner, do hereby grant, bargain, sell and convey unto the said J. S. Mullen and L. V. Mullen, all the right, title and interest that we now have, may or might hereafter have or acquire in any manner whatsoever to the same.

By this instrument it is intended to convey all and singular the said land and premises hereinbefore described or such part thereof as the said Wilken Gardner may be entitled to as a citizen of the Choctaw Tribe of Indians, being of the same appraised value of the land described herein fee simple forever, unto the said J. S. Mullen and L. V. Mullen, their heirs and assigns, and all the right, title, claim and interest that we may now have or any manner hereafter acquire in and to the same.

To have and to hold all and singular the said lands and premises unto the said J. S. Mullen and L. V. Mullen, their heirs and assigns in fee simple, and we do for ourselves and our heirs, executors and administrators, covenant with and agree with and represent
34 and warrant unto the said J. S. Mullen and L. V. Mullen, that the said Wilken Gardner, died intestate and without issue of his body, and that we are the only and sole heirs of the said Wilken Gardner, and that we are lawfully seized in fee simple of all and singular said lands and premises; that the same are free and clear of all liens and in-umbrances, that we have a good and lawful right to sell the same and convey as aforesaid, that we will, and our heirs, executors and administrators shall forever warrant and defend the

title and possession of all and singular the said land and premises as aforegranted and conveyed unto the said J. S. Mullen and L. V. Mullen, their heirs and assigns against the claim or claims of all persons whomsoever, and if for any reason the said land hereinbefore filed upon, selected and allot-ed to the said Wilkin Gardner, shall be adjudged by any tr-bunal not to be the lands of the said Wilkin Gardner, that in that event the said Howard McBride, or his successor shall select, file upon and allot other lands of equal appraised value of that described herein, and all of the warranties and covenants herein *herein* shall extend to and cover said land so selected filed upon and allotted and that this conveyance shall extend to and convey all of said land, and if for any reason it should be necessary for another deed to be executed in order for a title in fee simple to pass to the said J. S. and L. V. Mullen, then in that event we do for ourselves, our heirs, executors, and administrators represent and warrant unto the said J. S. and L. V. Mullen, their heirs and assigns that we will execute such a deed conveying the same as aforesaid.

In witness whereof we have hereunto set our hands on this 6th day of January, 1906.

WILSON GARDNER.
ANDERSON GARDNER.
NANCY her x mark. GARDNER.

Witnesses:
WASH THOMPSON.
F. A. BONNER.

UNITED STATES OF AMERICA,
Central District,
Indian Territory:

Be It Remembered, that on this the 6th day of January 1906, before me the undersigned, a Notary Public, within and for the Central District of the Indian Territory, appeared in person Wilson Gardner, Anderson Gardner and Nancy Gardner, to me personally well known to be the persons whose names appear upon the within and foregoing deed of conveyance as the parties grantor, and state that they had executed the same for the uses, purposes and considerations therein mentioned and set forth, as their own voluntary act and deed;

In witness whereof, I have hereunto set my hand and affixed the seal of office on this the 6th day of January, 1906.

[SEAL.] HOWARD McBRIDE,
Notary Public.

My Commission expires on the — day of ——, 190–.

UNITED STATES OF AMERICA,
Indian Territory,
Southern District:

Be It Remembered that on this the 31st day of March 1906, before me a Notary Public in and for the Southern District aforesaid, personally appeared Frank A. Bonner, one of the subscribing witnesses to the foregoing deed, to me personally well known, who being by me first duly sworn, on his oath stated that he saw Wilson Gardner, Anderson Gardner and Nancy Gardner grantors in the said deed, subscribed said deed on the day of its date, for the uses, purposes and consideration therein mentioned and expressed, and that he and Wash Thompson, the other subscribing witness, subscribed the same as attesting witnesses at the request of said grantors.

In testimony whereof, I have hereunto set my hand, as such Notary Public, o nthis the 31st day of March, 1906.

[SEAL.]

E. DUNLAP,
Notary Public.

36 EXHIBIT "E."

"UNITED STATES OF AMERICA,
Indian Territory,
Central District:

Know all men by these presents:

That we, Wilson Gardner, Anderson Gardner, and Nancy Gardner, members and allottees of the Choctaw tribe of Indians and the brothers and wife respectively, the sole and only heirs of Wilken Gardner, deceased, who died on the 9th day of December, 1905, for and in consideration of the sum of $911.00, to us in hand paid by Mrs. Mattie Mitchell, the receipt of which is hereby acknowledged, *we* have this day and do by these presents, give grant, bargain, sell and convey unto the said Mrs. Mattie Mitchell, her heirs and assigns, all and singular the following described lands and premises, to-wit: The E. ½ of N. W. ¼ of N. E. ¼; the S. ½ of N. E. ¼; the N. E. ¼ of S. E. ¼; the N. ½ of N. W. ¼ of N. W. ¼ of S. E. ¼; the S. E. ¼ of N. W. ¼ of S. E. ¼; the N. E. ¼ of N. E. ¼ of S. W. ¼ all in section 6 Tp. 3 South, Range one East of the Indian Meridian, and consists of 180 acres more or less.

All of said lands being in the Chickasaw Nation, I. T. and said lands being part of the lands selected and allotted by Howard McBride, administrator of the estate of Wilkin Gardner, together with all and singular the improvements thereon situated, and all the right, privileges, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and all the right, title, claim and interest of the said Wilkin Gardner in and to all and singular said lands and

premises as hereinbefore described, and being part of the identical lands as designated by the records of the Commissioner to the Five Civilized Tribes as filed upon, selected and allotted to the said Wilken Gardner, as a member and allottee of the Choctaw Tribe of Indians, and all the right, title and claim and interest of the said Wilken Gardner, in and to all and singular the lands hereinbefore de-
37 scribed. And we the said Wilson Gardner, Anderson Gardner, and Nancy Gardner, the only and sole heirs of the said Wilken Gardner, and we the said and only heirs of Wilken Gardner, grant, bargain, sell and convey unto the said Mrs. Mattie Mitchell, all the right, title, claim and interest that — now have or may hereafter acquire in any manner whatsoever to the same.

By this instrument it is entended to convey and we do hereby convey all and singular the said lands and premises hereinbefore described, or such part thereof as the said Wilken Gardner, may be entitled to as an allottee of the Choctaw Tribe of Indians, and being of the same appraised value of the lands described herein, and unto her heirs and assigns, and all of the right, title, claim and interest that we may now have or may or might in any manner hereafter acquire in — to the same.

To have and to hold all and singular said lands and premises unto the said Mrs. Mattie Mitchell, her heirs and assigns in fee simple forever, and we do for ourselves and our heirs, executors and administrators covenant with, agree with and represent and warrant unto the said Mrs. Mattie Mitchell, her heirs and assigns that the said Wilken Gardner, died intestate and without issue of his body, and that we are the sole and only heirs of the said Wilken Gardner, and that we are lawfully seized in fee simple of all and singular said lands and premises: that the same is free and clear of all liens and incumbrances, and that we have a good and lawful right to sell and convey the same as aforesaid, and that we will and that our heirs, executors and administrators shall forever warrant and defend the title and possession of all and singular the said lands and premises as aforegranted and conveyed unto the said Mrs. Mattie Mitchell, her heirs and assigns, against the claim or claims of all persons whomsoever, and if for any reason the said lands as hereinbefore
38 described and filed upon selected allotted to the said Wilken Gardner, should be adjudged by any tribunal now in existence or that might be hereafter created not to be the lands of the said Wilken Gardner, then in that event the said Howard McBride, as administrator, or his successors, shall file upon select and file upon other lands of equal appraised value to that described therein, and that all the warrant-es and covenants herein shall extend to and cover said land so selected filed upon and allotted, and that this conveyance shall extend to and convey all such land and if for any reason it should be necessary for another deed to be executed in order that a title in fee simple may pass to the said Mrs. Mattie Mitchell, then in that event we do for ourselves our heirs, executors and administrators, represent and warrant unto the said Mrs. Mattie Mitchell, her heirs and assigns that we will execute such a deed conveying the same as aforesaid.

In witness whereof we, Anderson Gardner and Nancy Gardner, have hereunto set our hands and seal on this the 6th day of January, 1906, and Wilson Gardner on the 8th day of January, 1906.

WILSON GARDNER.
ANDERSON GARDNER.
her
NANCY x GARDNER.
mark.

Witnesses:
WASH THOMPSON.
F. A. BONNER.

UNITED STATES OF AMERICA,
Central District,
Indian Territory:

Be it remembered, that on this the 6 day of January, 1906, before me the undersigned, a Notary Public within and for the Central District of the Indian Territory, appeared in person Anderson Gardner and Nancy Gardner, to me personally well known to be
39 the persons whose names appear upon the within and foregoing deed of conveyance as the parties grantors, and stated that they had executed the same for the uses, purposes and consderations herein mentioned and set forth, as their own voluntary act and deed.

In witness whereof I have hereunto set my hand and affixed my seal — office on this the 6 day of January, 1906.

[SEAL.] HOWARD McBRIDE,
Notary Public.

My Commis-ion expires on the — day of Sept., 1909.

UNITED STATES OF AMERICA,
Central District, Indian Territory:

Be it remembered, that on this the 8th day of January, 1906, personally appeared before me the undersigned Notary Public duly commissioned and acting within and for said District and Territory, Wilson Gardner, to me known as being one of the grantors to the above and foregoing deed, and acknowledged to me that he had executed the said deed for the purposes and considerations therein mentioned and set forth.

In witness whereof, I hereunto set our hand and seal as Notary Public on this the 8th day of January, 1906.

[SEAL.] HOWARD McBRIDE,
Notary Public, Central District, Indian Territory.

Said petition of the plaintiffs is endorsed on its back as follows, to-wit:

Endorsements: Original. No. 1069. In the District Court
40 in Stephens County. J. S. Mullen et al., Plaintiffs, vs. Wilson Gardner et al., Defendants. Filed in District Court Oct. 12, 1912. M. J. Davis, Clerk, by F. Frensley, Deputy. H. A. Ledbetter and F. M. Adams, Ardmore, Okla., Attorneys for Plaintiffs.

Summons were duly issued in said cause for the defendants and each of said defendants were duly served with summons in said cause.

And be it remembered that on the 12th day of November, 1912, the defendants filed in said cause their demurrer to the petition of the plaintiffs, which said demurrer is in words and figures as follows, to-wit:

41 STATE OF OKLAHOMA,
County of Stephens:

L. V. MULLEN and J. S. MULLEN, Plaintiffs,

vs.

WILSON GARDNER, NANCY GARDNER, and ANDERSON GARDNER, Defendants.

Demurrer.

Comes now the defendants and demur to the petition of the plaintiffs herein and for grounds of objection state that the petition does not state facts sufficient to constitute a cause of action against the defendants and in favor of the plantiffs.

WOMACK & BROWN AND
R. C. MARTIN,
Attorneys for Defendants.

Endorsement on Back: No. 1069. L. V. Mullen and J. S. Mullen, Plaintiffs, vs. Wilson Gardner, Nancy Gardner and Anderson Gardner, Defendants. Demurrer. Filed in District Court Nov. 12, 1912. M. J. Davis, Clerk, by F. Frensley, Deputy.

And be it remembered that on the 10th day of February, 1913, the defendants filed in said cause their answer to the Petition of the plaintiffs, which said answer of the defendants is in words and figures as follows, to-wit:

42 In the District Court of Stephens County, State of Oklahoma.

L. V. MULLEN and J. S. MULLEN, Plaintiffs,

vs.

NANCY GARDNER, WILSON GARDNER, and ANDERSON GARDNER, Defendants.

Answer.

1.

Comes now the defendants Wilson Gardner and Anderson Gardner, and for answer to the petition of the plaintiffs filed herein, admit; That the residence of the parties and the location of the lands are true as stated in said petition; that Wilkin Gardner, deceased, therein mentioned, was a citizen of the Choctaw Tribe of Indians; that Wilkin Gardner died during the year 1905; that the lands described in paragraph one of said petition was allotted in the name of Wilkin Gardner, deceased; that Wilson Gardner and Anderson Gardner are heirs at law of Wilkin Gardner, deceased; and that defendants Wilson Gardner and Anderson Gardner, executed a deed, on or about the 6th day of January, 1906, purporting to convey to Alice Mitchell and the plaintiffs the lands described in paragraphs three and five of said petition.

2.

Defendants Wilson Gardner and Anderson Gardner deny each and every other material allegation in said petition, and specifically deny that the plaintiffs, or either of them, are or ever were the owners of or entitled to the possession of the lands described in paragraph one of plaintiffs' petition, except the N. W. ¼ of S. W. ¼ of S. E. ¼ of Sec. 3 Twp. 5, S., R 2 E., and S. W. ¼ of N. E. ¼ of S. E. ¼ of Sec. 34, Twp. 4 S. R. 2 E., and N. E. ¼ of N. W. ¼ of S. W. ¼ of Sec. 8, Twp. 5, S. R 7 E., thirty acres of land described in said paragraph one, and deny that any other lands had been designated, selected or allotted to, for or in the name of Wilkin Gardner
43 or his heirs, at the time of the execution of the said deeds to Alice Mitchell and plaintiffs.

3.

Defendants Wilson Gardner and Anderson Gardner state that said Wilkin Gardner was a duly enrolled full-blood citizen of the Choctaw Tribe of Indians; that he died intestate in what is now McCurtain County, Oklahoma, during the year 1905; that he left surviving him as his only heirs at law his two brothers the said Wilson Gardner and Anderson Gardner; that he left survi-ng him his wife the said Nancy Gardner; said Wilkin Gardner and Nancy Gardner had no issue; and that said Nancy Gardner is now dead.

4.

That prior to his death said Wilkin Gardner by virtue of his being a Choctaw Citizen, as above stated, was entitled to have set apart and allotted to him three hundred twenty acres of the average allot-able tribal lands of the Chickasaw-Choctaw Nations; that he died before such lands had been selected for him; that subsequent to his death his heirs, the said Wilson Gardner and Anderson Gardner, who are both duly enrolled full-blood citizens of the Choctaw tribe of Indians, were entitled to have selected and allot-ed, in the name of said deceased brother, for their sole benefit, said acreage and amount of lands from the tribal lands of the Chickasaw-Choctaw Nations.

5.

That on the 3rd day of January, 1906, Howard McBride appeared before the Commissioner to the Five Civilized Tribes at Muskogee and represented himself to be the administrator of the estate of Wilkin Gardner, deceased; that thereupon he had designated
44 and selected, from the tribal lands of said two tribes of Indians, the thirty acres of lands described specifically herein in paragraph two, the same being thirty acres of the lands described in paragraph one of petition of plaintiffs filed herein; that no other lands, other than said thirty acres, were designated, selected or allot-ed in the name of Wilkin Gardner, for the benefit of his heirs, until the 9th day of September, 1910, that on the 9th day of September, 1910, the Commissioner to the Five Civilized Tribes at Muskogee arbitrarily selected and allotted, from the tri-al lands of the Chickasaw-Choctaw Tribes of Indians, in the name of Wilkin Gardner, the following described lands:

S. 20 and 06/100 acres of lot 3 of Sec. 7, twp. 1 N. R. 5 W.
N. 20 and 06/100 acres of lot 4 of Sec. 7, twp. 1 N. R. 5 W.
S. ½ of N. E. ¼ of S. E. ¼ of Sec. 12, twp. 1 N. R. 6 W.
S. E. ¼ of S. E. ¼ of Sec. 12, twp. 1 N. R. 6 W.
N. W. ¼ S. E. ¼ of S. E. ¼ of Sec. 7, twp. 5 S., R. 2 E.
S. E. ¼ of S. W. ¼ of N. W. ¼ of Sec. 25, twp. 1 S. R. 2 W.
S. E. ¼ of N. W. ¼ of N. E. ¼ of Sec. 23, twp. 8 S. R. 2 W.
N. ½ of N. W. ¼ of S. W. ¼ of N. E. ¼ of Sec. 23, twp. 8 S., R. 2 W.
N. 19 and 97/100 acres of Lot 4 of Sec. 4, twp. 3 N. R. 7 W.
S. W. 10 acres of lot 1 of Sec. 4, twp. 3 N. R. 7 W.
N. W. ¼ of S. W. ¼ of N. E. ¼ of Sec. 4 Twp. 3 N. R. 7 W.
S. E. ¼ of S. ¼ of N. E. ¼ of Sec. 4, twp. 3 N. R. 7 W.
S. W. 10 acres of lot 2 of Sec. 4 twp. 3 N. R. 7 W.
N. W. 8 and 36/100 acres of Lot 17 of Sec. 18, twp. 4 N. R. 7 W.

6.

That the said lands described above in paragraph five together with the thirty acres described in paragraph two of this answer con-

stitute an entire allotment and are the same lands claimed by plaintiffs and described in paragraph one of their petition.

45

7.

That by virtue of being the heirs at law of said Wilkin Gardner, deceased, defendants, Wilson Gardner and Anderson Gardner are now and have been since the arbitrary selection, the joint owners in fee simple of and entitled to the possession of the lands above described in paragraph five herein; and that said defendants have never executed a deed or contract purporting to convey said lands, or any part thereof, to plaintiffs or to any person through whom plaintiffs claim.

8.

That plaintiffs, as stated in their petition, claim to be the owners of the lands described in paragraphs five of this ans-er by virtue of said deeds to plaintiffs and Alice Mitchell, dated January 6th, 1906, and a similar covenant in each of said deeds, the covenant in the plaintiffs' deed being as follows:

"And if for any reason the lands hereinbefore filed upon, selected and allotted to the said Wilkin Gardner, should be adjudged by any tribunal not to be the lands of the said Wilkin Gardner, then in that event the said Howard McBride or his successor shall select, file upon and allot other lands of equal appraised value of that described in and cover said land so selected, filed upon and allotted, and this conveyance shall extend to and convey all of said land, and if for any reason it shall be necessary for another deed to be executed in order for a title in fee simple to pass to the said J. S. Mullen and L. V. Mullen, that in that event we do for ourselves, our heirs, executors and administrators represent and warrant unto the said J. S. Mullen and L. V. Mullen, their heirs and assigns, that we will execute such a deed conveying the same as aforesaid."

46 A like covenant is contained in said Alice Mitchell'- deed.

9.

That said plaintif-s and their grantor Alice Mitchell, acquired no right, title or interest in the lands described in paragraph five of this answer by virtue of said two deeds of January 6th, 1906, or by subsequent deed from said Mitchell to the plaintiffs or by virtue of said quoted covenant contained in said deeds of January, 1906; that covenant or agreement contained therein was and is null and void; that said defendants had no interest in the lands described in said deeds, the same being described in paragraph five herein, except said thirty acres described in paragraph two herein, said lands being then and were until the 9th day of September, 1910, tirbal lands of the Chickasaw-Choctaw Nations, and were, at the time of the execution of said deeds, and until the 9th day of September, 1910, under the sole control of the Interior Department of the Federal Govern-

ment for the purpose of distribution among the members of the Chickasaw-Choctaw Tribe under laws, treaties, rules and regulations of Congress and said Department formulated for the purpose of assisting in a proper distribution of said lands; and that said two deeds, so far as the lands in paragraph five herein are concerned, and the said quoted covenant contained in each were and are in conflict with said laws, treaties, rules and regulations, and operate against the plan and policy of the Federal Government in the proper distribution of said tribal lands.

10.

Defendants further answering state that said Howard McBride was not, at the time he selected said thirty acres of land in the name of Wilkin Gardner, the administrator of the estate of said Wilkin Gardner, deceased; that at that time and at the time of the execution of the said two deeds to Mitchell and plaintiffs, on the
47 6th day of January, 1906, said Howard McBride was in the employe of and was the agent of plaintiffs in procuring leases, contracts and deeds upon Indian lands for the benefit of said plaintiffs; that at that time he was also employed by plaintiff in selecting tribal lands for Indians to file upon and which tracts were small in acreage and selected without consulting the Indians adjacent to large tracts then owned by plaintiffs; that then said selections were purchased by plaintiffs usually to their great advantage; that the lands described in the said deed to Alice Mitchell was for the benefit of plaintiffs, said Alice Mitchell was to hold the legal title thereto for the benefit of the plaintiffs; that at the time defendants signed said two deeds, to Mitchell and plaintiffs, on the 6th day of January, 1906, plaintiffs and their agents stated and represented to defendants that said Howard McBride was the administrator of the estate of Wilkin Gardner, that he had selected an allotment for said Wilkin Gardner, that the three defendants named in petition of plaintiff jointly owned same and could then sell it, that said deeds were instruments conveying the same; that plaintiffs did not mention, read or explain the said quoted covenants or agreements contained *h*erein to said defendants; that plaintiffs knew said statements were *sale;* that said statements, together with the concealment of said covenants from defendants, were made for the purpose of obtaining the signatures of defendants to said deeds; that said defendants, being ignorant, uneducated full-blood Indians, and having confidence in plaintiffs and their agents and believing said statements, and knowing nothing of said covenants contained in said deeds, and not having read said deeds and without fair opportunity to read them, signed said deeds; and that said defendants
48 knew nothing of the falcity of said statements or the fraud practiced upon them until they attempted to convey the lands allotted to Wilkin Gardner during the latter part of 1912; and that had they known the facts in reference to the selection of their deceased brother's lands at the time they signed said deeds,

and had they known said covenants and agreements were in said deeds they would not have executed the same.

11.

That plaintiffs have been in unlawful possession and adversely to defendants of the lands described in paragraph five of this answer from and since the 9th day of September, 1910; that they have received the rents and profits therefrom since that time; and that the reasonable rental value for the use of said lands described in said paragraph five from and since that time is the sum of Six Hundred and Nine Dollars, and in which said sum plaintiffs are indebted to defendants for the use of said lands.

Wherefore, defendants pray:

That petition of plaintiff be denied.

That it be decreed that plaintiffs, or their assigns, have no right, title or interest in the lands described in paragraph five of this answer, and that the covenant set out in paragraph 8 of this answer, and which is contained in the deeds held by plaintiff, be declared null and void for two reasons: 1st. As a matter of law; 2nd. because obtained by fraud.

That defendants Wilson Gardner and Anderson Gardner have judgment against plaintiffs in the sum of Six Hundred Nine Dollars for the use of said lands since the 9th day of September, 1910.

49 That defendants Wilson Gardner and Anderson Gardner be decreed to be the joint owners of the lands described in paragraph five of this answer and that title thereto be quieted in them.

That said defendants have judgment for possession of said lands.

And for all other and further relief that is equitable in the premises.

WOMACK & BROWN AND
R. C. MARTIN,
Attorneys for the Defendants."

Atty. lien claim filed.

Endorsed on back as follows: No. 1069. L. V. Mullen and J. S. Mullen, Plaintiffs, vs. Wilson Gardner et al., Defendants. Answer of Defendants Wilson Gardner and Anderson Gardner. Filed in District Court Feb. 10, 1913. M. J. Davis, Clerk, by F. Frensley, Deputy. Lien Claim Filed.

And be it remembered that on the 5th day of April, 1931, the Plaintiffs filed in said cause their Demurrer to the Answer of the defendants; which said Demurrer is in words and figures as follows, to-wit:

50 "In the District Court within and for Stephens County, Okla.

No. 1069.

L. V. MULLEN et al., Plaintiffs,

vs.

NANCY GARDNER et al., Defendants.

Demurrer.

Now comes the plaintiffs and demur to paragraph ten of the answer of the defendants filed herein, and as grounds therefor state, that the statements set forth in said paragraph ten fail to state facts sufficient to constitute a defense to plaintiff's ca-se of action, and fail to state facts sufficient to warrant a recovery in favor of the defendants, and against these plaintiffs, for all of which they pray judgment of the court.

H. A. LEDBETTER,
Attorney for Plaintiffs.

Endorsements on back: No. 1069. L. V. Mullen et al. v. Nancy Gardner et al. Demurrer. Filed in District Court Apr. 5, 1913. M. J. Davis, Clerk, by F. Frensley, Deputy."

Demurrer Overruled.

And be it remembered that on the said 5th day of April, 1913, the Court overruled the foregoing demurrer of the plaintiffs to the answer of the defendants, to which the plaintiffs at the time duly excepted and exceptions were allowed by the court.

51 And be it remembered that on April 5th, 1913, the plaintiff filed in said cause their Motion to revive, which said Motion is as follows:

"In the District Court Within and for Stephens County, Okla.

No. 1069.

L. V. MULLEN et al., Plaintiffs,

vs.

NANCY GARDNER et al., Defendants.

Motion to Revive.

Now comes the plaintiffs and make this their motion to revive this cause as to the defendant Nancy Gardner, and as grounds therefor state as follows:

1. That they learned from the answer filed herein that the defendant Wison Gardner was dead. The plaintiffs say that this suit was filed and service had against Nancy Gardner, and that the other two defendants Wilson Gardner, and Anderson Gardner are the only real parties in interest, but that in as much as Wilson Gardner was made a party, they ask that this cause be revived in the name of Phelina Gardner his wife, and Anderson Gardner, as there has been no regular administrator appointed, so these plaintiffs are informed, or that this cause be revived in the name of the heirs of Wilson Gardner, which heirs are Phelina Gardner and Anderson Gardner.

H. A. LEDBETTER,
Attorney for the Plaintiffs.

Endorsements on back: No. 1069. L. V. Mullen et al. vs. Nancy Gardner, et al. Motion to revive. Filed in District Court Apr. 5, 1913. M. J. Davis, Clerk, by F. Frensley, Deputy."

52 And be it remembered that on the 5th day of April, 1913, the plaintiffs filed in said cause their Reply to the Answer of the defendants; which said Reply is in words and figures as follows, to-wit:

"In the District Court Within and for Stephens County, Okla.

No. 1069.

L. V. MULLEN et al., Plaintiffs,

vs.

NANCY GARDNER et al., Defendants.

Reply.

Now comes the plaintiffs and for reply to the answer of the defendants filed herein deny each and every, all and singular the allegations contained in paragraphs, One, Two, three, four, five, six, seven, eight, nine, ten and eleven, reserving however their demurrer and exceptions to said paragraph ten as shown by their demurrer on file herein.

For further reply these plaintiffs say that the defendants Wilson Gardner and Anderson Gardner received of and from these plaintiffs and their other grantors the sum of Ten Hundred Forty one and no/100 Dollars as the purchase price for the allotment of Wilkin Gardner, deceased, which sum of money was paid to the said defendants as full consideration for said land first selected by Howard McBride as administrator of the estate of Wilkin Gardner, deceased, and by the convenants in said conveyances the said sum of Ten hundred forty one dollars was made the consideration for the lands involved herein.

Wherefore, premises considered the plaintiff pray for the relief as

called for in the original petition, and in the event this can not be done then that the plaintiff have judgment against the defendants Wilson Gardner and Anderson Gardner for said sum of ten
53 hundred forty one dollars, with interest at the rate of six per cent per annum from January 6th, 1906, and that they have all other and further relief to which they may be entitled.

H. A. LEDBETTER,
Attorney for the Plaintiffs.

Endorsement on Back: No. 1069. L. V. Mullen et al. vs. Nancy Gardner et al. Reply. Filed in District Court Jan. 5, 1913. M. J. Davis, Clerk, by F. Frensley, deputy.

And be it remembered that on the 19th day of April, 1913, the defendants filed in said cause their Motion to be permitted to amend their answer on file in said cause adding paragraph number twelve thereto and setting out in said motion their requested amendment, which said Motion to amend Answer is in words and figures as follows, to-wit:

"STATE OF OKLAHOMA,
County of Stephens:

In the District Court.

No. —.

J. S. MULLEN and L. V. MULLEN, Plaintiffs,

vs.

ANDERSON GARDNER, NANCY GARDNER, and WILSON GARDNER (Revived in the Name of Phelina Gardner and Anderson Gardner, Heirs of Wilson Gardner, Deceased), Defendants.

54 *Motion to Amend Answer.*

Comes now the defendant- and move the court to allow them to amend their answer and cross-petition as hereinafter set forth:

Whereas, the testimony of Anderson Gardner, one of the defendants in this case, shows that the defendants Wilson Gardner, Anderson Gardner, and Nancy Gardner, received from the plaintiffs and their grantors, the sum of $1,041.30 as a consideration on the sixty day of January, 1906. And the testimony further shows that the defendant Nancy Gardner at the time of the execution of the deed on January 6, 1906, had no interest in the land attempted to be conveyed in said deed or any other time. That the defendants, Wilson Gardner and Anderson Gardner, were the sole and only heirs of Wilkin Gardner, deceased. The testimony further shows that said defendants Anderson Gardner and Wilson Gardner, received $347.10 each. And the testimony further shows that the plaintiff- are now the owners of and in possession of 30 acres of the land

attempted to be conveyed in their deed of January 6th, 1906, and that the defendant received for said 30 acres the sum of $97.50, and the defendant- make no claim to said 30 acres.

In view of the above testimony, the defendants ask at this time to amend the answer and cross-petition to conform to the proof by adding paragraph 12 which reads as follows:

"Paragraph 12. The defendants, Wilson Gardner, and Anderson Gardner, above named admit receiving the sum of $347.10 each as a consideration for the execution of the deed of January 6, 1906, and which is attached to the petition of the plaintiff- filed in this cause and they each here and now tender in this court for the benefit of the plaintiff- in this cause the sum of $347.10, less the sum of $32.50, and they do hereby tender the total sum of $694.20, less the sum of $65.00."

R. C. MARTIN AND
WOMACK & BROWN,
Attorneys for Defendants."

Endorsements on back: No. 1069. In the District Court within and for Stephens County, State of Oklahoma. J. S. Mullen, and L. V. Mullen, Plaintiffs, vs. Anderson Gardner et al., Defendants. Motion to Amend Answer. Filed Apr. 19, 1913. M. J. Davis, Clerk, by F. Frensley, Deputy."

Be it remembered that the foregoing Motion to Amend was made after the close of the evidence in said cause and should be considered as following the evidence in this case made.

D. M. CAVANESS,
Court Reporter.

And be it remembered that on the 17th day of April, 1913, the court made an order in said cause reviving said cause in the name of the heirs of Wilson Gardner, deceased, as requested by the Plaintiffs in their Motion heretofore appearing in this case made.

Case called for trial.
Transcript of the official stenographer.

56 *Transcript of the Official Stenographer.*

In the District Court of Stephens County, State of Oklahoma, Fifteenth Judicial District.

No. 1069.

L. V. MULLEN et al., Plaintiffs,

vs.

WILSON GARDNER et al., Defendants.

Transcript of Stenographer.

And be it remembered that on the 17th day of April, A. D. 1913, the above styled and numbered cause came on duly and regularly for trial in the District Court of Stephens County, Oklahoma, before the Honorable Frank M. Bailey, Judge of said Court, the Plaintiffs appeared in person and by their Attorney, Mr. H. A. Ledbetter, and the defendants appeared in person and by their attorneys, Messrs. Womack & Brown and Mr. R. C. Martin. Thereupon both Plaintiffs and Defendants announced ready for trial and waived the intervention of a Jury and agreed to try said cause to the Court. Whereupon the following proceedings were had in said cause, to-wit:

Mr. Ledbetter: The Plaintiff has filed a Motion to Revive as to one of the defendants, Wilson Gardner, who is now dead, and revive the case in the name of Phelina Gardner, and brother Anderson Gardner. The parties in whose name the case is revived enter their appearance by R. C. Martin and Womack & Brown, and ask to make the Answer of the original defendants the answer of the parties in whose names the case is revived.

By the Court: Very good, let the revivor be made and the answer of the original defendants be considered as filed as the answer of the new defendants.

By the Court: Statement of the case by the Plaintiff.

Statement of the case to the Court by Mr. Ledbetter, attorney for the Plaintiffs:

Mr. Ledbetter: "The plaintiffs expect the proof to show that in the early part of January 1906 Howard McBride appeared
57 before the Chickasaw Land Office and filed a written application to file on certain lands in Carter County, Oklahoma, filing for Wilkin Gardner, deceased, a member of the Choctaw Tribe of Indians, and after the filing of the application to file on these particular lands the Commission denied the right to file on same and then Howard McBride as administrator of Wilkin Gardner, deceased, entered a contest on the land described and desired to be filed upon; and after this was done Anderson Gardner and Wilson Gardner, who were the sole heirs of Wilkin Gardner, deceased, conveyed the

land to the plaintiffs and their grantors. The testimony will show that in the deed there was a stipulation to the effect that if the lands particularly described in the warranty deed was lost by the contest that the administrator, Howard McBride, or his successor in office, would file on other lands than those described in the deed and if necessary to convey title by the heirs to the lands thereafter selected, that the heirs agreed that they would make such proper conveyance of the lands thereafter selected to the plaintiffs herein, or their grantors. The testimony will further show that the lands were lost in the contest and the lands in controversy in this case were allotted in the name of Wilkin Gardner, deceased, in lieu of the lands theretofore attempted to be allotted in the first instance. The testimony will show that the lands in question were allotted in September, 1910, and immediately after the allotment the Plaintiffs and their grantors went into the possession and have been in the possession and control of the lands ever since the allotment.

The testimony will further disclose that in October, 1912, the plaintiffs *receiving* information that some Third parties were
58 seeking conveyances from these Indians, the heirs of Wilkin Gardner, deceased, when this suit was brought for specific performance in the deed of 1906 and quieting the title in the plaintiffs.

The testimony will further disclose that in the deed made to Mrs. Mattie Mitchell covering the lands in Carter County, she conveyed the lands to Bonner & Mullen and Bonner conveyed his interest in the land to Mr. Mullen.

The testimony will show that a part of the original allotment to Wilkin Gardner in Carter county was never contested and the testimony on the part of the defendants will be that they concede this particular land in Carter County belongs to the plaintiffs under the original deed.

The testimony will further disclose an injunction suit was brought in McCurtain County enjoining these defendants and other parties associated with them from seeking to convey the lands in controversy and in February 1913, since the institution of this case, the defendant Anderson Gardner conveyed the lands in controversy to a man by the name of Whiteman and that deed is now on record in the office of the Register of Deeds of this County.

The testimony will further show that Phelena Gardner, the wife of Anderson Gardner, conveyed the land to Whiteman in February of this year and since the institution of this suit and that the deed is now of record. The injunction was granted by Judge Hardy in McCurtain county and that injunction is still in force and effect and as to the last deeds placed of record given by these heirs the plaintiffs will ask to amend their petition to bring in those conveyances and ask that they be cancelled as clouds upon the title of the
59 plaintiffs.

The statement was omitted that the allotment made in September 1910 was made at the special instance and request of Howard McBride, as shown by the records of the Commission to the Five Civilized Tribes, this Howard McBride being the same party who attempted to select the lands in Carter County."

By the Court: State by the Defendant.

Statement of the case to the jury by Mr. R. C. Martin, attorney for the Defendants:

Mr. Martin: "The defendants expect to show by the testimony that Wilkin Gardner was a duly enrolled member of the Choctaw and Chickasaw Tribe of Indians; that he died intestate in McCurtain County, or in what is now McCurtain County, Oklahoma, in the year 1905; that he left as his heirs two brothers Wilson and Anderson Gardner; that he died without receiving his share of the lands of the Choctaw and Chickasaw Nations belonging to his tribe of Indians; and that on the 3rd day of January, 1906, one Howard McBride, who was then in the employe of the plaintiff in selecting lands for citizens to file upon for the purpose of subsequent purchase by the plaintiff, appeared before the Commission or Commissioner at Muskogee and represented himself to be administrator *fo* the estate of said Wilkin Gardner, deceased, that at that time he was not the administrator of the said Wilkin Gardner, deceased. That he represented to the Commission that he desired to select an allotment as administrator for the said Wilkin Gardner, deceased; that he attempted to select certain lands described in the petition of the plaintiff that at that time had been filed upon and selected by other Indian citizens and had been set apart for other citizens by the Commissioner. That at that time on the 3rd day of
60 January, 1906, thirty acres of the land described in the plaintiff-' petition was set apart by the Commission for the deceased, Wilkin Gardner; that on the 6th day of January, 1906, the said Wilson Gardner and Anderson Gardner, heirs of said Wilkin Gardner, deceased, executed two deeds, one conveying certain lands described in the plaintiffs' petition to one Alice Mitchell, who subsequently attempted to convey the same to the Plaintiff; the other deed attempted to convey certain lands described in the plaintiffs' petition to the plaintiff-; That at that time said Howard McBride was the agent and employe of the plaintiff and was employed and paid to make such selections for prospective allottees. That on the 9th day of September, 1910, the Commissioner at Muskogee arbitrarily selected and designated certain lands described in the plaintiffs' petition; that the lands so selected in September, 1910, composed $938.50 of the appraised value of the allotment and which land together with the thirty acres selected on the 3rd day of January, 1906, constituted and now constitutes the allotment of said Wilkin Gardner, deceased. That the lands described in the plaintiffs' petition and which are the same lands as designated by and selected by the Commission in September, 1910, were at that time and until such selection Tribal lands of the Choctaw and Chickasaw Indians."

Mr. Ledbetter: In order to get the record in proper shape, I now move for Judgment on the pleadings as now on file before the Court.

By the Court: The Motion is overruled.

Mr. Ledbetter: The plaintiffs except.

Mr. Ledbetter: I now move for judgment on the opening statement of counsel in the case.

By the Court: Which is overruled.

Mr. Ledbetter: The plaintiffs except.

61 By the Court: Call the first witness for the plaintiff.

Thereupon the following evidence was offered in said cause, being all of the evidence, both written and oral, offered in the trial of said cause:

Plaintiffs' Evidence.

Mr. Ledbetter: The Plaintiff now offers in Evidence Plaintiffs' Exhibit "1."

(No objection being offered the same is presented to the court.) Said Exhibit "1" being in words and figures as follows, to-wit:

"EXHIBIT 1."

62 "Department of the Interior.

Commissioner to the Five Civilized Tribes.

In the Matter of the Allotment of the Lands of the Choctaw- and Chickasaws.

Citizens by Blood and Intermarriage.

Chickasaw Nation.

"Exhibit 1," Plaintiffs'.

Ardmore, Indian Territory,
Jan. 3, 1906.

Testimony of Howard McBride in the Matter of the Allotment of the Lands of the Choctaws and Chickasaws to Wilkin Gardner, Deed.

HOWARD MCBRIDE, being first duly sworn, testifies as follows:

Q. What is your name?
A. Howard McBride.
Q. What is your post office address?
A. Lehigh, I. T.
Q. For whom are you making this application?
A. Wilkin Gardner, Deed.
Q. Was the person for whom this application is made living on September 25th, 1902?
A. Yes.
Q. Is he now living?
A. No.
Q. Has the person for whom you make this application received

or applied for an allotment of land in the Creek, Cherokee or Seminole Nation?

A. No.

Q. How do you represent this person?

A. Administrator.

Appraised value of lands allotted Jan. 3, 1906, $941.86. Contest, Ardmore.

Application is made for the following described land: Homestead: Roll, Choctaw B. B. No. 3710.

Application is made for the following described land exclusive of the homestead designated: N. W. ¼ S. W. ¼ S. E. ¼ Sec. 3, Town. 5 S. range 2 E. 10 acres. Appraised value, $32.50. Certificate No. 20885.

N. E. ¼ N. W. ¼ S. W. ¼ Sec. 8, Town. 5 S. Range 7 E. 10 Acres, appraised value, $32.50, certificate No. 20886.

S. W. ¼ N. E. ¼ S. E. ¼ Sec. 34, Town. 4 S. Range 2 E. 10 acres, appraised value, $32.50. Certificate No. 20887.

Total appraised value, $77.50.

Q. Have you been upon these lands and examined them with a view to making this selection?

A. Yes.

Q. Are you fully informed as to the location of the same?

A. Yes.

Q. Are you fully informed as to the location of the same and the character of the soil?

A. Yes.

5-191.

63 Q. Are there any improvements on these lands?

A. Yes.

Q. What do the improvements consist of?

A. 10 acres in Sec. 34, T. 4 S. R. 2 E. fenced & in cultivation.

Q. Who is the owner of these improvements?

A. I am.

Q. Have you obtained permission of —— to select the land on this — improvements are located?

A. ——.

Q. Does any one else claim these lands or any part of them?

A. No.

Q. Are there any tribal schools, churches, court houses, jails, or other tribal public buildings located on these lands?

A. No.

Q. Is that portion of the land which you have designated as a homestead suitable for a home?

A. ——.

Q. Do you in behalf of Wilkin Gardner accept the above de-

scribed land in allotment of the lands of the Choctaw- and Chickasaws?

A. Yes.

HOWARD McBRIDE.

Witness to Mark:

——— ———.

——— ———.

INDIAN TERRITORY,
Souther- District:

I, the undersigned, a notary public in and for said District, do certify that the foregoing statements of Howard McBride were reduced to writing in his presence and were read to and subscribed by him in my presence at the time and place and in the manner mentioned in the caption, he having been first sworn by me that the testimony he should give in the matter should be the truth, the whole truth and nothing but the truth.

Given under my hand and official seal this 3rd day of Jany., 1906.

[SEAL.]

J. H. CARLOCK,
Notary Public."

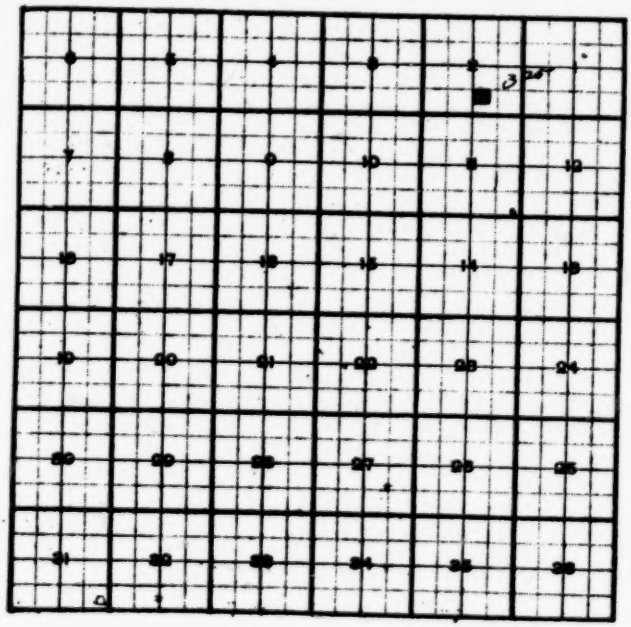
(Here follow plats marked pp. 64, 65, 66.)

Commissioner of the Land Office State of Oklahoma Oklahoma City

DEPARTMENT OF THE INTERIOR. COMMISSIONER TO THE FIVE CIVILIZED TRIBES. NATION

TOWNSHIP PLAT

Section _____ Township 50 Range 2-E



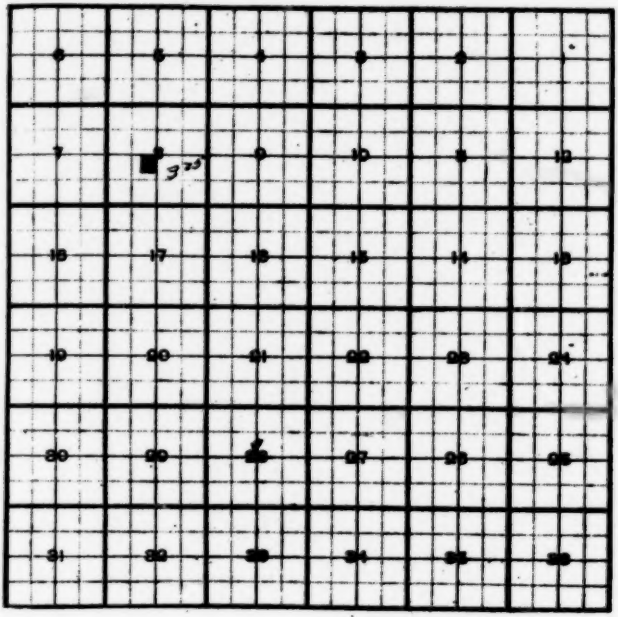
84

~~Commissioner of the Land Office — State of Oklahoma — Oklahoma City~~

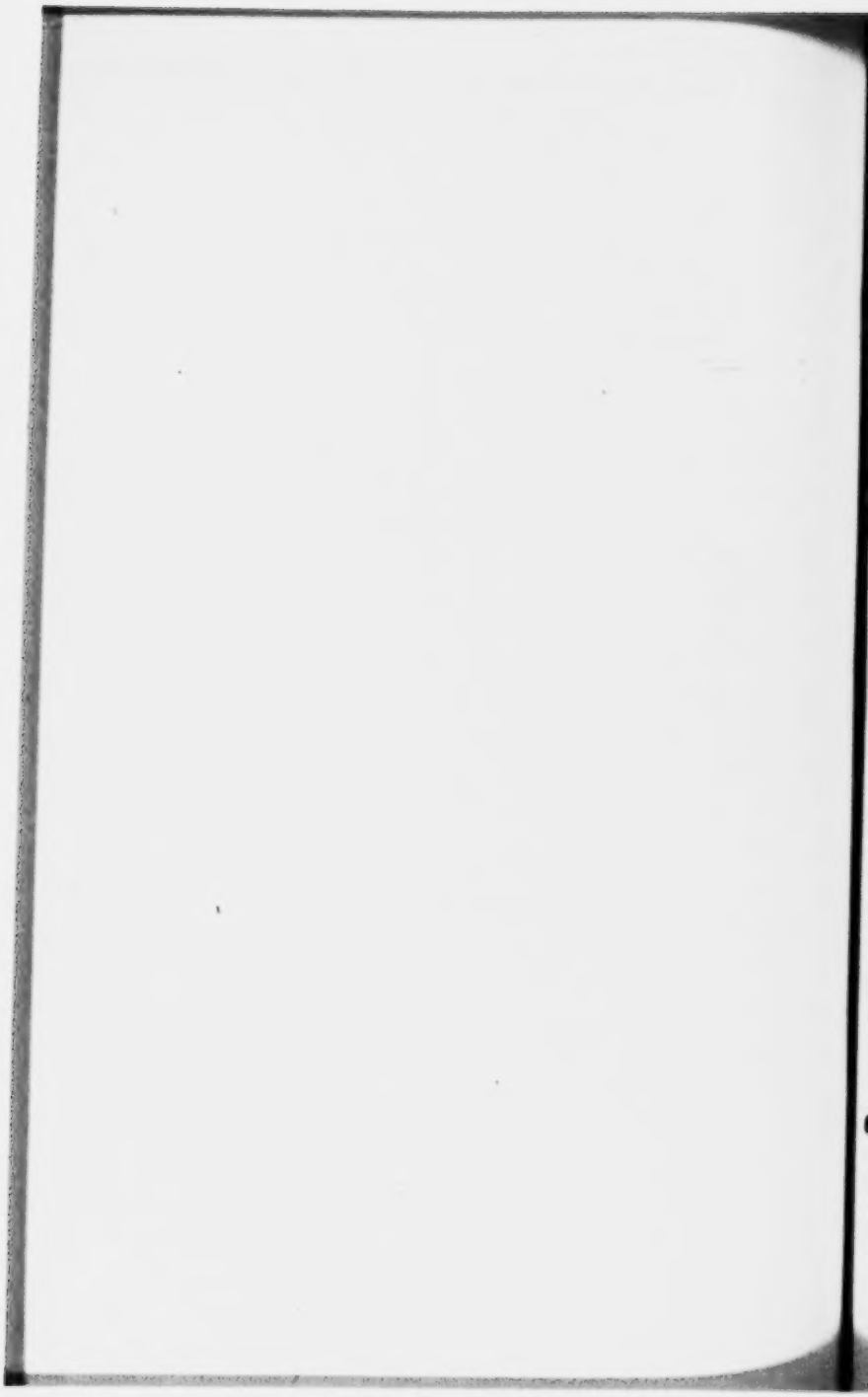
DEPARTMENT OF THE INTERIOR
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

TOWNSHIP PLAT

Section _____ Township 50 Range 7 - E



65

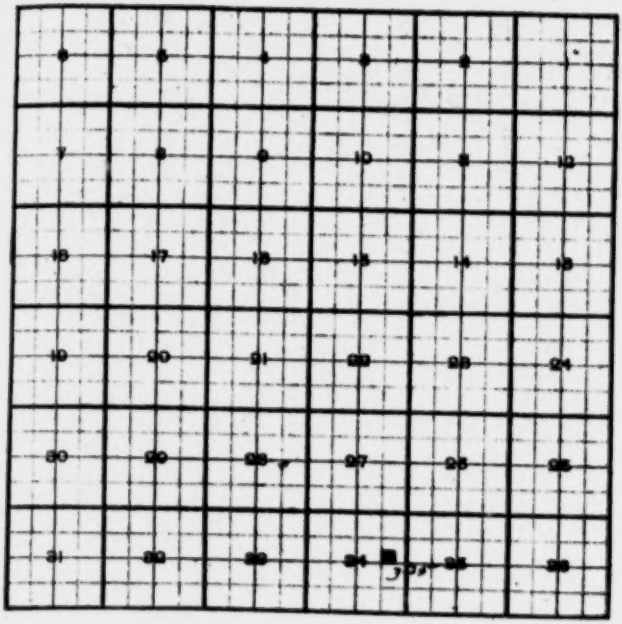


~~Commissioners of the Land Office~~ ~~State of Oklahoma~~ ~~Oklahoma City~~

DEPARTMENT OF THE INTERIOR
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

TOWNSHIP PLAT

Scale _____ Township 40 Range 2 - E



86

67 "Wilkin Gardner, Deed., by his administrator, Howard McBride. A-3710:

Department of the Interior,

Commission to the Five Civilized Tribes.

In the Matter of the Allotment of the Lands of the Choctaws and Chickasaws.

Choctaw Land Office.

Ardmore, Indian Territory,

Jan. 3, 1906.

You are hereby notified that the tract of land, described as S. E. ¼ N. W. ¼ S. W. ¼ Sec. 8 T. 5 S. R. 7 E. this day applied for by you as an allotment of the lands of the Choctaw Nation for Wilkin Gardner, Deed., was on the 6th day of Apl. 1905 filed on by J. L. Moore, administrator for Frances Emma Moore, Deed. B-1281 of Lynn and that it will be necessary for you to institute a contest therefor on or before — day of ——, 190–, for the purpose of determining your right to allot the same.

Service of the foregoing notice is hereby accepted.

HOWARD McBRIDE.

Witnesses:

—— ——.

—— ——.

68 Department of the Interior,

Commissioner to the Five Civilized Tribes.

In the Matter of the Allotment of the Lands of the Choctaws and Chickasaws.

Citizens by Blood and Intermarriage.

Chickasaw Nation.

Ardmore, Indian Territory,

Jan. 3, 1906.

Testimoney of Howard McBride in the Matter of the Allotment of the Lands of the Chickasaws and Choctaws to Wilkin Gardner, Deed.

HOWARD McBRIDE being first duly sworn, testified as follows:

Q. What is your nam[illegible]

A. Howard McBride.

Q. What is your post office address?
A. Lehigh, I. T.
Q. For whom are you making this application?
A. Wilkin Gardner, Deed.
Q. Was the person for whom this application is made living on September 25th, 1902?
A. Yes.
Q. Is he now living?
A. No.
Q. Has the person for whom this application is made received or applied for an allotment of land in the Creek, Cherokee, or Seminole Nation?
A. No.
Q. How do you represent this person?
A. As administrator.

Appraised value of lands allotted regular:

Jan. 3, 1906, ...	97.50	Contest Ardmore.
	909.36	
	1006.86	

Application is made for the following described land: Homestead; Choctaw BB.

Application is made for the following described land exclusive of the homestead designated: S. E. ¼ N. W. ¼ S. W. ¼ Sec. 8, Town 5 S. Range 7 E. 10 acres, appraised value 32.50.

Total appraised value 32.50.

Cancelled by Decision in Chick. Contest No. 2932.

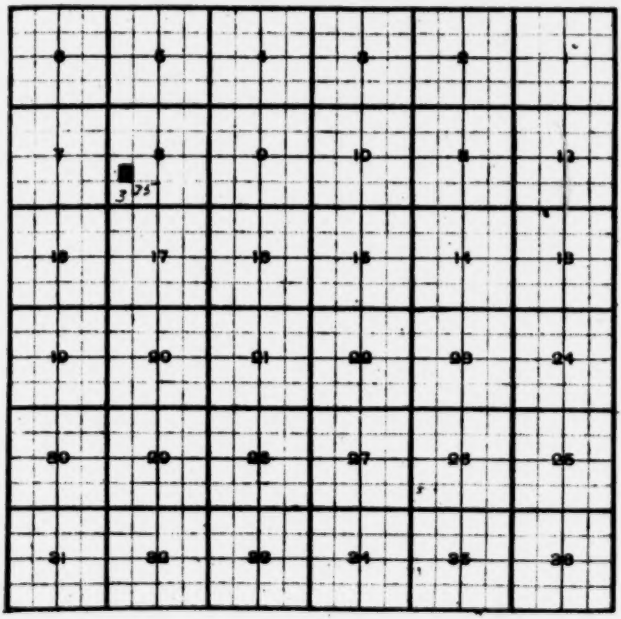
Q. Have you been upon these lands and examined them with a view to make this selection?
A. Yes.
Q. Are you fully informed as to the location of the same and the character of the *soul*?
A. Yes. Chickasaw allotment contest No. 2932.
69 Q. Are there any improvements on these lands?
A. Yes.
Q. What do the improvements consist of?
A. All fenced and in cultivation.
Q. Who is the owner of these improvements?
A. I am.
Q. Have you obtained permission of —— to select the land on which — improvements are located?
A. ——.
Q. Does *nay* one else claim these lands or any part of them?
A. It is filed on by Frances Emma Moore, Deed.
Q. Are there any tribal schools, churches, court houses, jails, or other public tribal buildings located on these lands?
A. No.

~~Commissioner of the Land Office — State of Oklahoma — Oklahoma City~~

DEPARTMENT OF THE INTERIOR.
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

TOWNSHIP PLAT

Section _____ Township 50 Range 7 - E



Q. Is that portion of the land which you have designated as a homestead suitalle for a home.

A. ——.

Q. Do you in behalf of Wilkin Gardner, Decd. accept the above described land in allotment of the lands of the Choctaws and Chickasaws?

A. Yes.

HOWARD McBRIDE.

Witnesses to mark:

—— ——.

—— ——.

INDIAN TERRITORY,
Southern District:

I, the undersigned, a notary public in and for said district, do certify that the foregoing statements of Howard McBride were reduced to writing in his presence and were read to and subscribed by him in my presence at the time and place and in the matter mentioned in the caption, he having been first sworn by me that the testimony, he should give in the matter should be the truth, the whole truth and nothing but the truth.

Given under my hand and official seal this 3rd day of Jany. 1906.

[SEAL.] J. H. CARLOCK,
Notary Public."

(Here follows plat marked p. 70.)

71 "William Gardner, Deed., by his administrator, Howard McBride. A-3710:

Department of the Interior,

Commission to the Five Civilized Tribes.

In the Matter of the Allotment of the Lands of the Choctaws and Chickasaws.

Choctaw Land Office.

Ardmore, Indian Territory,

Jan. 3, 1906.

You are hereby notified that the tract of land described as S. ½ N. E. ¼ and N. E. ¼ S. E. ¼ and E. ½ N. W. ¼ S. E. ¼ Sec. 6 T. 3 S. R. 1 E. this day applied for by you as an allotment of the lands of the Choctaw Nation for Wilkin Gardner, Deed., was on the 30th day of Nov. 1904, filed on by Henry Cooper, A 8253, of Stigler, and that it will be necessary for you to institute a contest therefor on or before — day of —— 190–, for the purpose of determining your right to allot the same.

Service of the foregoing notice is hereby accepted.

HOWARD McBRIDE.

Witnesses:

—— ——.

—— ——.

NOTE.—E. ½ S. W. ¼ Sec. 6 T. 3 S. R. 1 E. also involved in contest 2207.

72 [On left margin:] Canceled by decision Chick. contest #2935.

Department of the Interior,

Commissioner to the Five Civilized Tribes.

In the Matter of the Allotment of the Lands of the Choctaws and Chickasaws.

Citizens by Blood and Intermarriage.

Chickasaw Nation.

Ardmore, Indian Territory,
Jan. 3, 1906.

Testimony of Howard McBride in the Matter of the Allotment of the lands of the Choctaws and Chickasaws to Wilkin Gardner, Deed.

HOWARD MCBRIDE, being first duly sworn, testifies as follows:

Q. What is your name?
A. Howard McBride.
Q. What is your post office address?
A. Lehigh, I. T.
Q. For whom are you making this application?
A. Wilkin Gardner, Deed.
Q. Was the person for whom this application is made living on September 25th, 1902?
A. Yes.
Q. Is he now living?
A. No.
Q. Has the person for whom you make this application received or applied for an allotment of land in the Creek, Cherokee or Seminole Nation?
A. No.
Q. How do you represent this person?
A. As Administrator.

Appraised value of lands allotted regularly	$95.50
Contest Ardmore	246.85
	$344.35

Application is made for the following described land:
Homestead: Roll-Choctaw By Blood. No. 3710. Subdivision S. ½ N. E. ¼ Sec. 6 Town 3 S. Range 1 E. Acres 80, appraised value 500.
Application is made for the following described land exclusive of the homestead designated: N. E. ¼ S. E. ¼ Sec. 6. Town 3 S. Range 1 E. 40 acres, appraised value 130, and E. ½ N. W. ¼ S. E. ¼ Sec. 6, Town. 3 S. Range 1 E. 20 acres. Appraised value 65. Total appraised value 695.00.

Q. Have you been upon these lands and examined them with a view to making this selection?
A. Yes.
Q. Are you fully informed as to the location of the same and the character of the soil?
A. Yes.

Ex. 1 contd.

73 Q. Are there any improvements on these lands?
A. No.
Q. What do the improvements consist of?
A. ——.
Q. Who is the owner of the improvements?
A. ——.
Q. Have you obtained permission of —— to select the land on which — improvements are located?
A. ——.
Q. Does any one else claim these lands or any part of them?
A. It is filed on by Henry Cooper.
Q. Are there any tribal schools, churches, court houses, jails, or other tribal Public buildings located on these lands?
A. No.
Q. Is that portion of the land which you have designated as a homestead suitable for a home?
A. Yes.
Q. Do you in behalf of Wilson Gardner accept the above described land in allotment of the lands of the Choctaws and Chickasaws?
A. Yes.

HOWARD McBRIDE.

Witnesses to mark:
—— ——.
—— ——.

INDIAN TERRITORY,
Southern District:

I, The Undersigned, a notary public in and for said district, do certify that the foregoing statements of Howard McBride were reduced to writing in his presence and were read to and subscribed by him in my presence at the time and place and in the matter mentioned in the Caption, he having been first sworn by me that the testimony he should give in the matter should be the truth, the whole truth and nothing but the truth.

Given under my hand and seal this 3rd day of Jany. 1906.
[SEAL.]
J. H. CARLOCK,
Notary Public."

Ex. 1 contd.

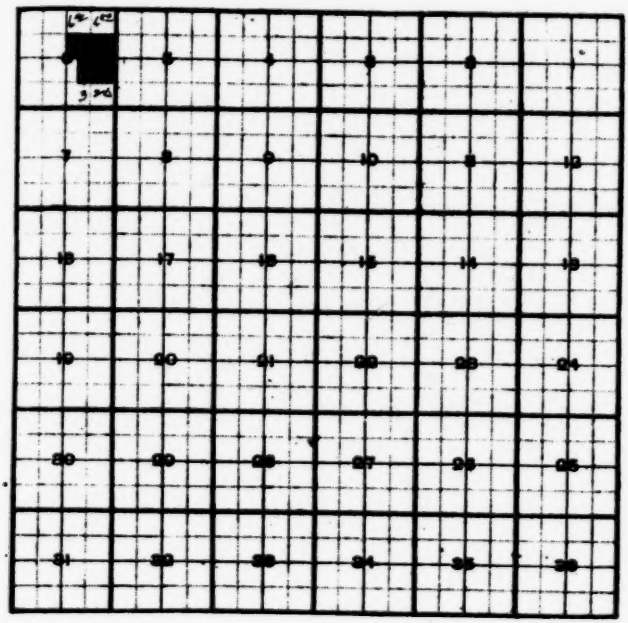
(Here follows plat marked p. 74.)

~~Commissioners of the Land Office — State of Oklahoma — Oklahoma City~~

DEPARTMENT OF THE INTERIOR.
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

TOWNSHIP PLAT

Section _____ Township 3 - S Range 1 - E



"Ex. 1" contd.

75 Wilkin Gardner, Decd. A-2710, by his Administrator, Howard McBride:

Department of the Interior.

Commission to the Five Civilized Tribes.

In the Matter of the Allotment of the Lands of the Chickasaws and Choctaws.

Choctaw Land Office.

Ardmore, Indian Territory,
Jan. 3, 1906.

You are hereby notified that the tract of land, described as N. W. ¼ N. W. ¼ S. E. ¼ & N. E. ¼ N. E. ¼ S. W. ¼ Sec. 6 T. 3 S. R. 1 E. this day applied for by you as an allotment of the lands of the Choctaw Nation for Wilkin Gardner, Decd., was on the 30th day of Nov. 1904, filed on by Henry Cooper for his daughter Maud S. Cooper A 8254, of Stigler, I. T., and that it will be necessary for you to institute a contest therefor on or before — day of ——, 190–, for the purpose of determining your right to allot the same.

Service of the foregoing notice is hereby accepted.
HOWARD McBRIDE."

Witness:
—— ——,
—— ——.

"Exhibit 1" contd.

76 Department of the Interior.

Commissioner to the Five Civilized Tribes.

In the Matter of the Allotment of the Lands of the Choctaws and Chickasaws.

Citizens by Blood and Intermarriage.

Chickasaw Nation.

Ardmore, Indian Territory,
Jan. 3, 1906.

Testimony of Howard McBride in the Matter of the Allotment of the Lands of the Choctaws and Chickasaws to Wilkin Gardner, Decd.

HOWARD McBRIDE being first duly sworn, testifies as follows:

Q. What is your name?
A. Howard McBride.

Q. What is your post office address?
A. Lehigh, I. T.
Q. For whom are you making this application?
A. Wilkin Gardner, Deed.
Q. Was the person for whom this application is made living on September 25th, 1902?
A. Yes.
Q. Is he now living?
A. No.
Q. Has the person for whom you make this application received or applied for an allotment of land in the Creek, Cherokee or Seminole Nation?
A. No.
Q. How do you represent this person?
A. As Administrator.

Appraised value of lands allotted:

Regular	97.50	
Contest	849.36	Ardmore.
	$946.86	

Application is made for the following described land; Homestead: Roll Choctaw B. B. No. 3710.

Application is made for the following described land exclusive of the homestead designated:

N. W. ¼ N. W. ¼ S. E. ¼ Sec. 6 Town 3 S. Range 1 E. acres 10. Appraised value	32.50
N. E. ¼ N. E. ¼ S. W. ¼ Sec. 6, Town 3 S. Range 1 E. 10 acres, appraised value	60.00
Total appraised value	$92.50

Cancelled by Decision in Chick. Contest No. 2934.

Q. Have you been upon these lands and examined them with a view of making this selection?
A. Yes.
Q. Are you fully informed as to the location of the same and the character of the soil?
A. Yes.

Chickasaw Allotment Contest No. 2934.
"Ex. 1" contd.

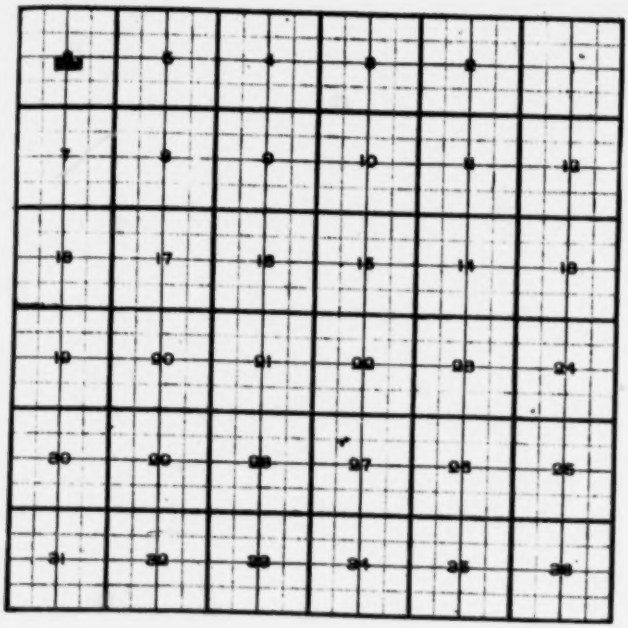
77 Q. Are there any improvements upon these lands?
A. Yes.
Q. What do the improvements consist of?
A. House & lot.
Q. Who is the owner of these improvements?
A. I am.

~~Commissioner of the Land Office~~ ~~State of Oklahoma~~ ~~Oklahoma City~~

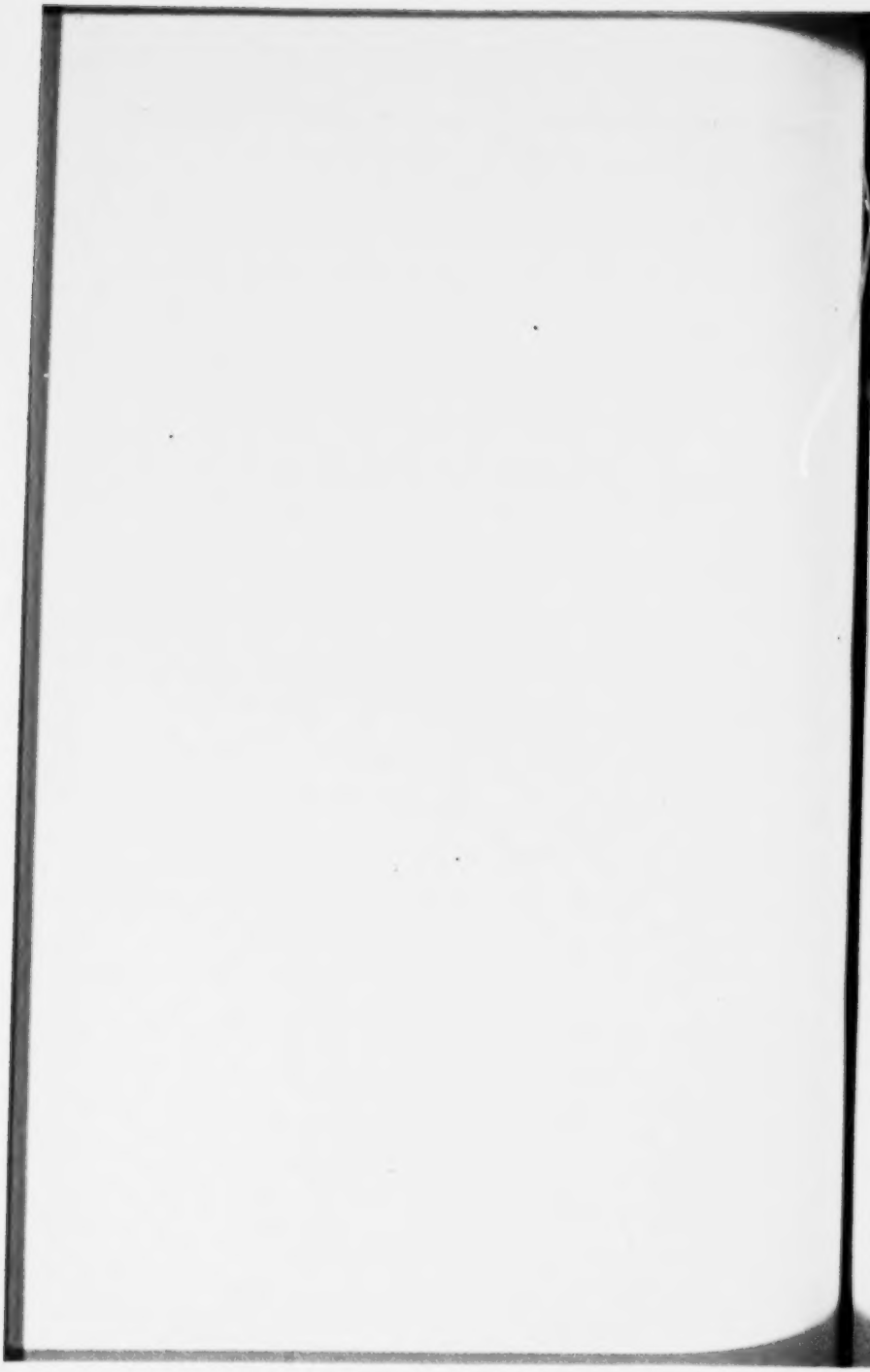
DEPARTMENT OF THE INTERIOR.
COMMISSIONER TO THE FIVE CIVILIZED TRIBES

TOWNSHIP PLAT

Section _____ Township 3 - S Range 1 - E



Ex."1" contd.



Q. Have you obtained permission of —— to select the land on which the improvements are located?

A. ——.

Q. Does any one else claim these lands or any part of them?

A. It is filed by Maud S. Cooper.

Q. Are there any tribal schools, churches, court houses, jails, or other tribal public buildings located on these lands?

A. No.

Q. Is that portion of the land which you have designated as a homestead suitable for a home?

A. Yes.

Q. Do you in behalf of Wilkin Gardner accept the above described lands in allotment of the Choctaws and Chickasaws?

A. Yes, sir.

HOWARD McBRIDE.

Witness to mark:

—— ——.

—— ——.

INDIAN TERRITORY,
Southern District:

I, the undersigned, a notary public in and for said district, do certify that the foregoing statements of Howard McBride were reduced to writing in his presence and were read to and subscribed by him in my presence at the time and place and in the matter mentioned in the caption, he having been first sworn by me that the testimony he should give in the matter should be the truth, the whole truth and nothing but the truth.

Given under my hand and official seal this 3rd day of Jan'y, 1906.

J. H. CARLOCK,
Notary Public.

"Ex. 1" contd.

(Here follows plat marked p. 78.)

79 "Wilkin Gardner, Decd., A-2710, by his Administrator, Howard McBride.

Department of the Interior.
Commission to the Five Civilized Tribes.

In the Matter of the Allotment of the Lands of the Choctaws and Chickasaws.

Choctaw Land Office.

Atoka, Indian Territory,
Jan. 3, 1906.

You are hereby notified that the tract of land, described as E. 20.31 A. Lot #2 T. 3 S. R. 1 E. this day applied for by you as an allotment of the lands of the Choctaw Nation for Wilkin Gardner, Decd., was on the 30th day of Nov., 1904, filed on by Henry Cooper for his daughter Willie Vera Cooper A 8255, of Stigler, and that it will be necessary for you to institute a contest therefor on or before — day of ——, 190–, for the purpose of determining your right to allot the same.

Service of the foregoing notice is hereby accepted.

HOWARD McBRIDE."

Witnesses:

—— ——.
—— ——.

"Ex. 1" contd.

80 Department of the Interior.
Commissioner to the Five Civilized Tribes.

In the Matter of the Allotment of the Lands of the Choctaws and Chickasaws.

Citizens by Blood and Intermarriage.

Chickasaw Nation.

Ardmore, Indian Territory,
Jan. 3, 1906.

Testimony of Howard McBride in the Matter of the Allotment of the Lands of the Chickasaw- and Choctaws to Wilkin Gardner, Decd.

HOWARD MCBRIDE, being first duly sworn, testified as follows:

Q. What is your name?
A. Howard McBride.

Q. What is your post office address?
A. Lehigh, I. T.
Q. For whom are you making this application?
A. Wilkin Gardner, Decd.
Q. Was the person for whom this application is made living on September 25th, 1902?
A. Yes.
Q. Is he now living?
A. No.
Q. Has the person for whom you make this application ever received or applied for an allotment of land in the Creek, Cherokee or Seminole Nation?
A. No.
Q. How do you represent this person?
A. As administrator.

Appraised value of lands allotted, Jan. 3, 1906:

Regular	97.50	
Contest	820.00	Ardmore.
	$917.50	

Application is made for the following described land: Homestead: Roll Choctaw B. B. No. 2710.
Application is made for the following described land exclusive of the homestead designated: E. 20.31 A. lot #2, Sec. 6, Town 3 S. Range 1 E. 20.31 acres. Appraised value 121.86.
Total appraised value 121.86.
Cancelled by Decision in Chick. Contest No. 2933.

Q. Have you been upon these lands and examined them with a view to making this selection?
A. Yes.
Q. Are you fully informed as to the location of the same and the character of the soil?
A. Yes.

Chickasaw allotment Contest No. 2933.
"Ex. 1" contd.

81 Q. Are there any improvements on these lands?
A. No.
Q. What do the improvements consist of?
A. ——.
Q. Who is the owner of these improvements?
A. ——.
Q. Have you obtained permission of —— to select the land on — this —— improvements are located?
A. ——.
Q. Does any one else claim these lands or any part of them?
A. It is filed on by Willis Vera Cooper.

Q. Are there any tribal schools, churches, court houses, jails, or other tribal public buildings located on these lands?

A. No.

Q. Is that portion of the land which you have designated as a homestead suitable for a home?

A. ——.

Q. Do you in behalf of Wilkin Gardner accept the above described land in allotment of the lands of the Choctaw- and Chickasaws?

A. Yes.

HOWARD McBRIDE.

Witness to Mark:

—— ——.

—— ——.

INDIAN TERRITORY,
Southern District:

I, the undersigned, a notary public in and for said district, do certify that the foregoing statements of Howard McBride were reduced to writing in his presence and were read to and subscribed by him in my presence at the time and place and in the matter mentioned in the caption, he having been first sworn by me that the testimony he should give in the matter should be the truth, the whole truth and nothing but the truth.

Given under my hand and official seal this 3rd day of Jan'y, 1906.

[SEAL.]

J. H. CARLOCK,
Notary Public."

"EX. 1" contd.

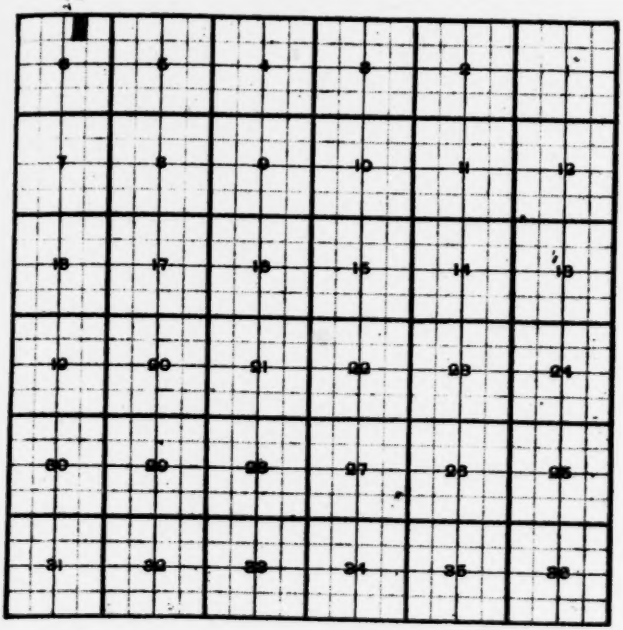
(Here follows plat marked p. 82.)

~~Commissioner of the Land Office~~ ~~State of Oklahoma~~ ~~Oklahoma City~~

DEPARTMENT OF THE INTERIOR.
COMMISSIONER TO THE FIVE CIVILIZED TRIBES

TOWNSHIP PLAT

Section ~~1~~ 3 Township 3-S Range 1 - E



"Ex. 1" contd.

83 Exhibit "1" continued.

"Department of the Interior.

Commissioner to the Five Civilized Tribes.

Muskogee, Oklahoma,

April 12, 1913.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing are true and correct copies of applications filed January 3, 1906, in the matter of the allotment of lands of the Choctaws and Chickasaws to Wilkin Gardner, deceased.

J. G. WRIGHT,
Commissioner to the Five Civilized Tribes."

C. D. D."

84 Mr. Ledbetter: The plaintiff- now of-ers in evidence Plaintiffs' Exhibit "2," being letters of Administration issued on December 30th, 1905, to Howard McBride as administrator of the estate of Wilkin Gardner.

Mr. Martin: The defendants object to the purported Letters of Administration for the reason the same bears date of December 30th, 1905, and the act purported to have been done by Howard McBride having taken place in January, 1906, and the question is whether or not he was the duly appointed, qualified and acting administrator of the estate of Wilkin Gardner, deceased, on the 3rd day of January, 1906, and we object for the further reason that the purported copy of the letters of administration are not duly or properly authenticated as such by the purported officer.

By the Court: What is the defect in the Certificate?

Mr. Martin: The man who certifies to it does not purport to be the Clerk of that Court; we do not know whether that man has the custody of that record or the records, of that court or not or why he should have them?

By the Court: The objection is overruled.

Mr. Martin: The defendants except.

Said letters of administration, Exhibit "2" being in words and figures as follows, to-wit:

"Exhibit 2," Plaintiffs':

85 EXHIBIT NO. "2," PLAINTIFFS'.

"Letters of Administration.

UNITED STATES OF AMERICA,
Indian Territory,
Central District,
—— *Division, ss:*

The President of the United States of America to all to whom these presents shall come, Greeting:

Know ye, that whereas Wilkin Gardner of the Central District of the Indian Territory, died intestate, as it is said, on or about the 9th day of Dec., 1905, A. D. 191–, having at the time of his death personal property, in the Indian Territory which may be lost, destroyed or diminished in value, if speedy care be not taken of the same, to the end therefore, that the said property may be collected, preserved and disposed of according to law, we do hereby appoint Howard McBride of the Central District of the Indian Territory, Administrator of all and singular the goods, chattels, rights and credits which were of the said Wilkin Gardner at the time of his death, with full power and authority to dispose of the said property according to law, and collect all moneys due the said deceased, and in general to do and to perform all other acts and things which are or hereafter may be required of him by law.

Witness, the Honorable Thos. C. Humphry, Judge of the United States Court in the Central District of the Indian Territory and the Seal thereof, at Antlers in the Indian Territory, this 30 day of December, A. D. 1905.

[SEAL.]

E. J. FANNIN, *Clerk,*
By JOS. R. FOLTZ, *Deputy.*

86 STATE OF OKLAHOMA,
Pushmataha County:

I, J. C. Attaway, Clerk of the County Court, for Pushmataha County, State of Oklahoma, do hereby certify that the within and foregoing is a true and correct copy of the letters issued by the United States Court for the Central District of the Indian Territory, at Antlers, in the within styled case, as appears from the records of said court now on file in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the County Court at Antlers, in said County and State, this the 5th day of April, 1913.

[SEAL.]

J. G. ATTAWAY,
Clerk of the County Court."

Mr. Ledbetter: The plaintiffs now offer in evidence "Exhibit 3" being a certified copy of Contest decision regarding the lands previously sold to the plaintiffs, and selected for the said Wilkin Gardner.

Mr. Martin: Objected to by the defendants for the reason the same is incompetent, irrelevant and immaterial, and does not tend to prove or disprove any of the issues in this case.

By the Court: Let it be admitted for the purpose of showing the result of the contest.

Mr. Martin: The defendants except.

Said "Exhibit 3" being in words and figures as follows, to-wit:

"Exhibit 3," Plaintiffs'.

87 "EXHIBIT 3," PLAINTIFFS'.

G. A. W.

"Department of the Interior,

Office of Indian Affairs.

I. T.
1685-1907.
85248.
File 313.

Washington, December 16, 1907.

Subject: Chickasaw Allotment.
Contest: Noah vs. James.

Chickasaw Allotment Contest No. 2101.

J. W. ANDERSON, Administrator of the Estate of Lila Noah, Deceased, Contestant,

vs.

LOTTIE JAMES, Contestee.

Land in controversy: The S. W. ¼ of N. E. ¼ of N. W. ¼; the N. W. ¼ of S. E. ¼ of N. W. ¼; the S. ½ of S. E. ¼ of N. W. ¼ and N. E. ¼ of S. W. ¼ of Section 33, township 2 south, range 1 east of the Indian Meridian, containing 80 acres.

With which are consolidated:

Chickasaw Allotment Contest No. 2102.

J. W. ANDERSON, Administrator of the Estate of Lila Noah, Deceased, Contestant,

vs.

MARY COOPER, Contestee.

Land in controversy: The S. ½ of N. W. ¼ of N. E. ¼; S. ½ of N. E. ¼ of N. W. ¼; N. W. ¼ of N. W. ¼ of S. E. ¼; S. E. ¼

of N. W. ¼, and S. W. ¼ of N. E. ¼ of Section 31, township 2 south, range 1 east of the Indian Meridian, containing 130 acres.

Chickasaw Allotment Contest No. 2103.

J. W. ANDERSON, Administrator of the Estate of Lila Noah, Deceased, Contestee,

vs.

EZEKIEL C. MCLAUGHLIN, Contestee.

88 Land in controversy: The S. ½ of N. E. ¼ of N. E. ¼; the S. E. ¼ of N. W. ¼ of N. E. ¼; and the N. E. ¼ of S. W. ¼ of N. E. ¼; and W. 2 of S. E. ¼ of N. E. ¼, and the S. E. ¼ of S. W. ¼ of N. E. ¼ of Section 32, township 2 South, range 1 east of the Indian Meridian containing 70 acres.

Chickasaw Allotment Contest No. 2105.

WILSON H. JAMES, Contestant,

vs.

MARY COOPER, Contestee.

Land in controversy: The S. E. ¼ of N. E. ¼ and the N. E. ¼ of S. E. ¼ of Section 31, township 2 south, range 1 east of the Indian Meridian, containing 80 acres.

Chickasaw Allotment Contest No. 2106.

WILSON H. JAMES, Contestant,

vs.

EZEKIEL C. MCLAUGHLIN, Contestee.

Land in controversy: The W. ½ of S. W. ¼ of N. E. ¼; the N. ½ of N. W. ¼ of S. E. ¼; the S. E. ¼ of N. W. ¼ of S. E. ¼, and the S. W. ¼ of N. E. ¼ of S. E. ¼ of Section 32, township 2 south, range 1 east of the Indian Meridian, containing 60 acres.

Chickasaw Allotment Contest No. 2107.

WILSON H. JAMES, Contestant,

vs.

MARY E. JENNINGS, Contestee.

Land in controversy: The N. W. ¼ of S. E. ¼ of N. W. ¼; the S. ½ of S. E. ¼ of N. W. ¼ and the N. ½ of N. E. ¼ of S. W. ¼ of Section 32, township 2 south, range 1 east of the Indian Meridian, containing 50 acres.

89 *Chickasaw Allotment Contest No.* 2118.

SALINA Y. BONNER, Contestant,

vs.

HENRY COOPER, Contestee.

Land in Controversy: The South 20 acres of Lot 1, of Section 6, township 3 south, range 1 east of the Indian meridian, containing 20 acres.

Chickasaw Allotment Contest No. 2207.

SILLY FRAZIER, by Her Guardian, JOHN HARRIS, Contestant,

vs.

WILLIE VERA COOPER, Contestee.

Land in Controversy: The E. ½ of the S. E. ¼ of the N. W. ¼ of Section 6, township 3 south, range 1 east of the Indian Meridian, containing 20 acres.

Chickasaw Allotment Contest No. 2208.

SILLY FRAZIER, by Her Guardian, JOHN HARRIS, Contestant,

vs.

MAUD S. COOPER, a Minor, Contestee; F. A. BONNER, Administrator of the Estate of Eliza Bell, Deceased, Intervenor.

Land in controversy: The W. ½ of the N. E. ¼ of S. W. ¼; the S. E. ¼ of the N. E. ¼ of the S. W. ¼ and the N. W. ¼ of the S. E. ¼ of S. W. ¼ of Section 6, township 3 south, range 1 east of the Indian Meridian, containing 40 acres.

Chickasaw Allotment Contest No. 2209.

SILLY FRAZIER, by Her Guardian, JOHN HARRIS, Contestant,

vs.

MARY COOPER, Contestant; F. A. BONNER, Administrator of the Estate of Eliza Bell, Deceased, Intervenor.

90 Land in Controversy: The N. E. ¼ of the N. W. ¼ of the S. E. ¼; the S. ½ of the N. W. ¼ of the S. E. ¼, and the S. W. ¼ of the S. E. ¼ of Section 31, township 2 south, range 1 east of the Indian Meridian, containing 70 acres.

Chickasaw Allotment Contest No. 2215.

F. A. BONNER, Administrator of the Estate of Eliza Bell, Deceased, Contestant,

vs.

MAUD S. COOPER, a Minor, Contestee.

Land in Controversy: The N. E. 10 acres of lot 7 and the N. E. ¼ of the S. E. ¼ of the S. W. ¼ of Section 6, township 3 south, range 1 East of the Indian Meridian, containing 20 acres.

Chickasaw Allotment Contest No. 2216.

F. A. BONNER, Administrator of the Estate of Eliza Bell, Deceased, Contestant,

vs.

GENRY COOPER, Contestee.

Land in Controversy: The S. ½ of the S. E. ¼ of the S. E. ¼ of Section 31, township 2 south, range 1 east; and the N. 20.80 acres of Lot 1, section 6, township 3 south, range 1 east of the Indian Meridian, containing 40.80 acres.

Chickasaw Allotment Contest No. 2217.

F. A. BONNER, Administrator of the Estate of Eliza Bell, Deceased, Contestant,

vs.

MARY COOPER, Contestee.

Land in Controversy: The N. ½ of the S. E. ¼ of the S. E. ¼ of Section 31, township 2 south, range 1 east of the Indian Meridian, containing 20 acres.

91 *Chickasaw Allotment Contest No. 2295.*

J. P. WARD, Administrator of the Estate of Albert Davis, Deceased, Contestant,

vs.

WILLIE VERA COOPER, a Minor, Contestee.

Land in Controversy: Lots 3, 4, and 5, and the W. ½ of the S. E. ¼ of the N. W. ¼ of Section 6, township 3 South, range 1 east of the Indian Meridian, containing 131.27 acres.

Chickasaw Allotment Contest No. 2296.

J. P. WARD, Administrator of the Estate of Albert Davis, Deceased, Contestant,

vs.

MAUD S. COOPER, a Minor, Contestee.

Land in Controversy: Lot 6, and the W. 15.54 acres of Lot 7, and the S. E. 10 acres of Lot 7, of Section 6, township 3 south, range 1 east of the Indian Meridian, containing 61.03 acres.

Chickasaw Allotment Contest No. 2933.

HOWARD MCBRIDE, Administrator of the Estate of Wilkin Gardner, Deceased, Contestant,

vs.

WILLIE VERA COOPER, a Minor Contestee.

Land in Controversy: The E. 20.31 acres of Lot 2, of Section 6, township 3 South, Range 1 East of the Indian Meridian, containing 20.31 acres.

Chickasaw Allotment Contest No. 2934.

HOWARD MCBRIDE, Administrator of the Estate of Wilkin Gardner, Deceased, Contestant,

92 vs.

MAUD S. COOPER, a Minor, Contestee.

Land in Controversy: The N. W. ¼ of the N. W. ¼ of the S. E. ¼, and the N. E. ¼ of the N. E. ¼ of the S. W. ¼ of section 6, Township 3 South, Range 1 East of the Indian Meridian, containing 20 acres.

Chickasaw Allotment Contest No. 2935.

HOWARD MCBRIDE, Administrator of the Estate of Wilkin Gardner, Deceased, Contestant,

vs.

HENRY COOPER, Contestee.

Land in Controversy: The S. ½ of the N. E. ¼; the N. E. ¼ of the S. E. ¼, and the E. ½ of the N. W. ¼ of the S. E. ¼ of Section 6, township 3 south, range 1 east of the Indian, Meridian, containing 140 acres.

Commissioner to the Five Civilized Tribes, Muskogee, Okla.

SIR: The office is in receipt of your communication of January 2, 1907, forwarding the appeal, together with the record, in the above entitled Chickasaw Allotment Contest Case.

The record shows that all the parties litigant are entitled to allotments in the Choctaw and Chickasaw Nations.

The record also shows that on March 23, and May 13, 1905, Lottie James appeared at the Chickasaw Land Office and made application for lands involved in contest case No. 2101, and that this land was accordingly set apart to her as a part of her allotment selec-
93 tion. On June 30, 1905, J. W. Anderson, administrator of the estate of Lila Noah, deceased, appeared at the Chickasaw land Office and made application for the land involved in contest No. 2101, but in view of the prior selection his application was refused. On the same day he filed his complaint in contest, duly verified, alleging:

That the said described land is now fenced and has been fenced for the past several years; that much of it is in cultivation, and has thereon lasting and valuable and permanent improvements; that the said contestant is the owner of the improvements located on said tract of land, and is in the possession thereof.

Similar proceedings were had relative to the other land involved in this consolidated contest. After hearing on the merits of the cases, you rendered a decision on October 4, 1906, holding that:

The southwest quarter of the northeast quarter of the northwest quarter; the northwest quarter of the southeast quarter of the northwest quarter; the south half of the southwest quarter of the northwest quarter and the northeast quarter of the southwest quarter of section thirty-three, township two south, range one east of the Indian Meridian, containing eighty (80) acres more or less and being the land in controversy in Chickasaw Allotment contest No. 2101, be and remain a portion of the allotment selection of Lottie James, the contestee therein; that the south half of the northeast quarter of the northeast quarter; the south half of the northeast quarter of the northwest quarter; the northwest quarter of the northwest quarter of the southeast quarter; the southeast quarter of the northwest quarter, and the southwest quarter of the northeast quarter of Section thirty-one, township two south, range one east of the Indian Meridian, containing One Hundred and Thirty (130) acres
94 and being the land in controversy in Chickasaw allotment contest No. 2102, and the southeast quarter of the northeast quarter, and the northeast quarter of the southeast quarter of section thirty-one, township two south, range one east of the Indian Meridian, containing eighty (80) acres, and being the land in controversy in Chickasaw Allotment Contest No. 2105, be allowed to remain a portion of the allotment selection of Mary Cooper, the contestee therein; that the south half of the northeast quarter of the northeast quarter, the southeast quarter of the northwest quarter of the northeast quarter; the northeast quarter of the southwest quarter of the

northeast quarter; the west half of the southeast quarter, or the northeast quarter, and the southeast quarter of the northwest quarter of the northeast quarter of section thirty-two, township two south, range one east of the Indian Meridian, containing seventy (70) acres, and being the land in controversy in Chickasaw Allotment Contest No. 2103; and the west half of the southwest quarter of the northeast quarter; the north half of the northwest quarter of the southeast quarter; the southeast quarter of the northwest quarter of the southeast quarter, and the southwest quarter of the northeast quarter of the southeast quarter of section thirty-two, township two south, range one east of the Indian Meridian, containing sixty (60) acres and being the land in controversy in Chickasaw Allotment contest No. 2106, be and remain a portion of the allotment selection of Ezekiel C. McLaughlin, the contestee therein; that the northwest quarter of the southeast quarter of the northwest quarter; the south half of the southeast quarter of the northwest quarter, and the north half of the northeast quarter of the southwest quarter of section thirty-two, township two south, range one east of the Indian
95 meridian, containing fifty (50) acres and being the land in controversy in Chickasaw Allotment contest No. 2107, be and remain a portion of the allotment selection of Mary E. Jennings, the contestee therein; that the south Twenty (2-) acres of lot one, of section six, township three south, range one east of the Indian Meridian, containing twenty (20) acres and being the land in controversy in Chickasaw Allotment Contest No. 2118, and the North twenty and eighty one-hundredths (20.80) acres of lot one, of section six, township three south, range one east of the Indian Meridian, containing twenty and eighty one-hundredths acres, and being a portion of the land in controversy in Chickasaw Allotment Contest No. 2216, and the east half of the southeast quarter of the northeast quarter of section six, township three south, range one east of the Indian Meridian, containing twenty (20) acres, and being a portion of the land in controversy in Chickasaw Allotment Contest No. 2935, be and remain a portion of the allotment selection of Henry Cooper, the contestee therein; that the east half of the southeast quarter of the northwest quarter of section six, township three south range one east of the Indian Meridian containing twenty (20) acres, and being the land in controversy in Chickasaw Allotment Contest No. 2207, and lots three and four of section six, township three south, range one east of the Indian meridian, containing seventy-five and eighty-two one hundredths (75.82) acres, and being a portion of the land in controversy in Chickasaw Allotment Contest No. 2295, be and remain a portion of the allotment selection of Willie Vera Cooper, the minor contestee therein; that the west half of the northeast quarter of the southwest quarter, and the southeast quar-
96 ter of the northeast quarter of the southwest quarter, and the northwest quarter of the southeast quarter of the southwest quarter of section six, township three south, range one east of the Indian Meridian, containing forty (40) acres, and being the land in controversy in Chickasaw Allotment Contest No. 2208; and the Northeast quarter of the Northwest quarter of the southeast quarter;

the south half of the northwest quarter of the southeast quarter, and the southwest quarter of the southeast quarter, and the southeast quarter, of section thirty-one (31), township two south, range one east of the Indian Meridian, containing seventy (70) acres, and being the land in controversy in Chickasaw Allotment Contest No. 2209; and the south half of the southeast quarter of the southeast quarter of section thirty-one, township two south, range one east of the Indian Meridian, containing Twenty (20) acres, and being a portion of the land in controversy in Chickasaw Allotment Contest No. 2216; and the north half of the northeast quarter of the southeast quarter of section Thirty-one, township two south, range *and* one east of the Indian Meridian, containing twenty (20) acres and being the land in controversy in Chickasaw Allotment Contest No. 2217, be awarded to the heirs of Eliza Bell, the administrator of whose estate is intervenor in said Contests Nos. 2208 and 2209, and contestant in said contests Nos. 2216 and 2217; that the northeast ten acres of lot 7, and the northeast quarter of the southeast quarter of the southwest quarter of Section six, township three south, range one east of the Indian Meridian, containing twenty (20) acres, and being the land in controversy in Chick-saw Allotment Con-
97 test 2215; and the southeast ten acres of lot seven of section six, township three south, range one east of the Indian Meridian; containing ten acres, and being a portion of the land in controversy in Chickasaw Allotment Contest No. 2296, be allowed to remain a portion of the allotment selection of Maud S. Cooper, the minor contestee therein; that lot five and the west half of the southeast quarter of the northwest quarter of section six, township three south, range one east of the Indian Meridian, containing fifty-five and forty-five one-hundredths (55.45) acres, and being a portion of the land in controversy in Chickasaw Allotment contest No. 2295, and Lot 6 and the west fifteen and fifty-four one-hundredths (15.54) acres of lot Seven of section six, township three south, range one east of the Indian meridian, containing fifty-one and three one-hundre-ths (51.03) acres, and being a portion of the land in controversy in Chickasaw Allotment Contest No. 2296, be awarded to the heirs of Albert Davis, the administrator of whose estate is contestant therein; that the east twenty and thirty-one hundredths (20.31) acres of lot two of section six, township three south, range one east of the Indian Meridian, containing twenty and thirty-one one-hundre-ths (20.31) acres, and being the land in controversy in Chicka-saw Allotment Contest No. 2933; the northwest quarter of the northwest quarter of the southeast quarter, and the northeast quarter of the northeast quarter of the southwest quarter of Section six, township three south, range one east of the Indian Meridian, containing twenty (20) acres, and being the land in controversy in Chickasaw Allotment Contest No. 2934; and the southwest quarter of the northeast quarter; the west half of the southeast quarter of the northeast quarter; the northeast quarter of the southeast quarter; and the east half of the northwest — of the southeast quarter of section six, township three south, range one east of the Indian

98 Meridian, containing one hundred and twenty (120) acres, and being a portion of the land in controversy in Chickasaw Allotment Contest No. 2935, be awarded to the heirs of Wilkin Gardner, the administrator of whose estate is contestant therein.

Notice of your decision was mailed to parties of record on October 9, 1906. The registry receipts show that James A. Cotner, attorney for contestants, received such notice on October 10, 1906; that S. A. Apple, attorney for contestee in contest No. 2101, received such notice on October 10, 1907. The registry return receipt fails to show, however, the date on which Chilcon Riley, attorney for the contestees in the other cases, received notice of your deci-ion. On October 23, 1906, John Harris, guardian of Silly Frazier, filed a waiver of right of appeal in contests Nos. 2207, 2208 and 2209. On November 9, 1906, the contestants appealed to this office from your decision in so far as it awarded any of the land in controversy to the contestees. On November 9, 1906, the contestees filed a motion for rehearing and review.

Rule 21 of the rules and regulations governing allotments contests of the Choctaw, Chickasaw and Cherokee Nations, provides:

Motions for rehearing and review mu-t be accompanied by an affidavit of the party, or his attorney, to the effect that the motion is made in good faith, and not for the purpose of delay.

No such affidavit accompanied this motion, which is consequently improper in form. On November 14, 1906, contestee filed an appeal in so far as any of the land in this consolidated case was awarded to the contestants or intervenors.

99 On November 24, 1906, contestants filed a motion to dismiss the motion for rehearing and review filed by the contestees, on the ground that it was not filed within the time prescribed by the rules and regulations.

On November 26, 1906, contestants filed a motion to dismiss the contestees' appeal on the ground that the appeal was not filed within the prescribed time. On December 11, 1906, the contestees filed reply brief to the contestants' appeal and argument.

In forwarding the papers in this case on December 26, 1906, you say that the filing of the motion for rehearing was subsequent to the filing of the appeal of November 8, 1906, "which appeal, together with the appeal of November 14, 1906, covers all of the cases consolidated under No. 2101." For these reasons, you deem it advisable to transmit the complete record to this office on the appeal.

On October 25, 1907, attorneys for contestees filed another motion for rehearing. The contestees have apparently failed to comply with Departmental rules and regulations in so far as they relate to the filing of appeals and motions for rehearing and review. However, the facts in this case are such that justice requires a consideration on the merits. For authority for such action, your attention is invited to Departmental letter of July 10, 1906, relative to the Choctaw allotment contest case entitled Ike Pool vs. Louisa E. F. Jackson. In that case a decision had been rendered by this office adverse to the contestee. After the time for filing an appeal she forwarded certain papers to the Department. In giving her

100 permission to file an appeal after the prescribed time, the Department used the following language;

From the papers now before the Department it is considered that justice requires that the contestee, Louisa E. F. Jackson, be permitted to file an appeal to the Department.

The record discloses the following facts: The land in controversy was originally held by one A. B. Roff, who had thereon improvements and had it in cultivation. He and members of his family lived there. He was a court Claimant, and fearing an adverse decision in the matter of his application for citizenship, on September 2, 1904, he executed a bill of sale to Joseph S. Mullen, Reuben Freeny, S. J. Hargis, Mattie Mitchell and Albert Davis, attempting to convey to them in severalty the greater part of the land concerned in this litigation. By the terms of this agreement, the grantor was to have the use and occupancy of the lands and of the rents and revenues arising therefrom for the years 1904, 1905 and 1906, with the understanding that he was to become the tenant of the grantees. This bill of sale was acknowledged before a Notary Public.

The various contestants, with the exception of J. P. Ward, administrator of the estate of Albert Evans, claim title by reason of conveyances to them by the grantees in the foregoing bill of sale, All of such conveyances, however, *as* alleged to have been made subsequent to the date the respective contestee filed.

In rendering your decision, you held that the grantees of J. S. Mullen and Reuben Freeny could take no title, as their grantors, were excessive-holders at the time they attempted to convey, the lands having been previously filed on. You held, by impli-

101 cation, that the other grantees, Sarah J. Hargis and Mattie Mitchell, could convey preference right to the lands conveyed to them subsequent to the contestees' filings. In this connection, attention is invited to Departmental decision, dated May 10, 1907, in the Chickasha allotment contest case entitled Willie Fisher vs. Louis Pelsworth, wherein the Department used the following language:

"The department considers that preference rights of selection are personal only, and cannot be acquired through sale or transfer of improvements after application has been filed for the lands involved by or on behalf of another."

This office therefore concludes that all conveyances subsequent to contestees' filings by the grantees of Roff were inoperative to vest preference rights in the vendees. This office cannot therefore concur in your decision in so far as it awarded any of the land in controversy to such vendees. The land is therefore awarded as follows:

To the respective contestees the land involved in contests Nos. 2101, 2102, 2103, 2105, 2106, 2107, 2118, 2207, 2208, 2209, 2215, 2216, 2217, 2933, 2934, 2935; of the land involved in contest No. 2295 Lot 5 and the W. ½ of the S. E. ¼ of N. W. ¼ of Section 6, Township 3 South, range 1 East, to the heirs of Albert Davis, contestant; Lots 3 and 4, section 6, Township 3 South, range 1 east to Willie Vera Cooper, the minor contestee; of the lands involved in contest No. 2296, lot 6 and the West 15.54 acres of Lot 7, section 6,

township 3 South, range 1 East, to the heirs of Albert Davis, the contestant, and the S. E. 10 acres of lot 7, section 6, township 3 South, range 1 East, to Maud S. Copper, minor contestee.

102 As hereinbefore set forth, the application for rehearing on behalf of the contestees, filed November 9, 1906, is not in proper form. The motion for rehearing filed October 25, 1907, was not filed within the prescribed time. The contestees have therefore not shown such compliance with the rules as to entitle them to have their motion considered on its merits. However, apart from all such considerations, the affidavits filed in support of the motion do not show that the contestees could now produce witnesses who refused to testify at the hearing, nor is it evident that the contestees could not have obtained the other witnesses they now desire, at the trial. Furthermore, their testimony could not have changed the findings of the office. The motions for rehearing are accordingly overruled.

You are instructed to give the interested parties notice of this decision as well as of their further right to appeal.

Very respectfully,

C. F. LARRABEE,
Acting Commissioner.

C. R. W.–S. D.

Department of the Interior.

Commissioner to the Five Civilized Tribes.

Muskogee, Oklahoma,

April 12, 1913.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickashaw Cherokee, Creek and Seminole Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of final decision in the Chichashaw Allotment Contest No. 2101, consolidated.

J. G. WRIGHT,
Commissioner to the Five Civilized Tribes."

C. D."

103 Mr. Ledbetter: The plaintiffs now offer in evidence Plaintiffs' exhibit No. "4."

Mr. Martin: Objected to for the same reason; it is incompetent, irrelevant and immaterial and does not tend to prove or disprove any of the issues in this case.

By the Court. Overruled.

Mr. Martin: The defendants except.

Said "Exhibit 4" being in words and figures as follows, towit:

(Copy.)

"I. T. 72935-1907.
16853-1908.

Department of the Interior.

Office of Indian Affiars.

Washington, April 1, 1908.

W. D. G.—Subject: Chickasaw Allotment Contest No. -932.

Chickasaw Allotment Contest No. 2932.

HOWARD MCBRIDE, Administrator of the Estate of Wilkin Gardner, Deceased, Contestant,

vs.

J. L. MOORE, Administrator of the Estate of Frances Emma Moore, Deceased, Contestee.

Land in Controversy: S. E. ¼ of N. W. ¼ of S. W. ¼ of Section 8, township 5 south, range 7 east of the Indian Meridian, containing 10 acres.

Commissioner to the Five Civilized Tribes, Muskogee, Oklahoma.

SIR: The office is in receipt of your letter of August 26, 1907, transmitting the record on appeal in the above entitled cause.

104 The record shows that Wilkin Gardner was a citizen by intermarriage of the Choctaw Nation; that Frances Emma Moore was a citizen by intermarriage of the Choctaw Nation, and that each is entitled to an allotment of the land of the Choctaw and Chickasaw Nation-.

J. L. Moore, as administrator of the estate of Frances Emma Moore, deceased, *in* April 6, 1905, selected the land involved, and it was set apart as a part of the decedent's allotment selection.

On January 3, 1906, Howard McBride, as a-ministrator of the estate of Wilkin Gardner, deceased, made application for the land in dispute, but as it had been previously selected, his application was refused. He, therefore, on January 5, 1906, filed his duly verified complaint, towit:

The contestant, Howard McBride, states that Wilkin Gardner is now deceased, and was a citizen of the Choctaw Nation. That on the 3rd day of January, 1906, he made application to the Commissioner to the Five Civilized Tribes *as* the Chickasaw Land Office to take in allotment for Wilkin Gardner the S. E. ¼ of the N. W. ¼ of the S. W. ¼ of Sec. 8, of T. 5 S. and R. 7 E., and it appeared of record that on the 6th day of April 1905, the said tract of land was

selected by J. L. Moore, administrator, for Frances Emma Moore, deceased.

The contestant further states that at the date of the filing of the contestee, and for a long time prior thereto, the contestant's vendors, citizens of the Choctaw and Chickasaw Nations had been owners of, and in the possession of the improvements located on said tract of land, which improvements consists of fencing, and lands in cultivation; that at this time the contestant is the owner of, and in the possession of the improvements — were located on said land at
105 the date of the filing of the contestee, and are now located on said lands.

This cause was regularly heard on May 15, 1906, contestant appearing by counsel, and contestee not appearing.

Your decision in favor of the contestee was rendered on June 12, 1907, and on June 18, 1907, notice thereof was sent to the parties interested by registered mail, contestant being notified of her right of appeal within thirty days.

Contestant, on July 5, 1907, filed an appeal, showing service of a copy thereof by registered mail on contestee of July 3, 1907.

The contestant in his appeal asks that your decision be reversed, for the reason that it is *contract* to law in the case, but failed to allege any errors in your rulings on which he relies for reversal.

The office is also in receipt of your letter of March 3, 1908, transmitting an amended appeal, filed by contestant on February 27th, 1908, in accordance with office letter of February 5th, 1908, allowing fifteen days from the date of the notice in which to amend the appeal.

The amended appeal, as filed, alleges that you erred in holding that contestant did not acquire a valid title to the land in controversy, because of the fact that he purchased the improvements thereon after the contestee had made his allotment selection.

It appears from the evidence that the improvements on the land involved consist of a fence inclosing it, and of being partly in cultivation; having been originally placed in cultivation by T. B. Moore, the improvements were transferred by Mr. Moore to J. W. Folsom and James Alexander; by them to J. S. Mullen, and by him,
106 on or about January 1, 1906, to the contestant.

It is shown by the record in this case that contestant did not acquire any right to the land in dispute until more than nine months after the contestee had selected it, by reason of which fact no valid title became vested in contestant.

In Fisher vs. Pebsworth, the Department held:

That preference rights of selection are personal only and cannot be acquired through sale or transfer of improvements after application has been filed for land involved by or on behalf of another.

The rule, as laid down by the Department in the above mentioned case, is fair and just to all parties concerned, as it was incumbent on the contestant, before making the purchase, to inform himself as to whether some other citizen had selected the land.

For the reasons given, your decision of June 12, 1907, is affirmed.

You are requested to notify the parties interested, and advise them of their further right of appeal.

Very respectfully,

C. F. LARRABEE,
Acting Commissioner."

Y.

Department of the Interior.

Commissioner to the Five Civilized Tribes.

Muskogee, Oklahoma,

April 12, 1913.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw,
107 Chickasaw, Cherokee, Creek and Seminole Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of final decision in the Chickasaw Allotment Contest No. 2932.

J. G. WRIGHT,
Commissioner to the Five Civilized Tribes."

C. D. D."

Mr. Ledbetter: The Plaintiffs now offer in evidence "Exhibit 5" deed made by Anderson Gardner and Wilson Gardner dated January 20th, 1906, this deed being made to Mrs. Mattie Mitchell, showing a consideration of $930.00, recorded in Stephens County in October, 1912, together with the affidavit of F. M. Adams, as shown by the records of the Register of Deed's office of this County, a copy of the affidavit of F. M. Adams being marked "Exhibit 6," this affidavit being recorded at the same time in Stephens County that the deed was recorded from Anderson Gardner, Wilson Gardner and Nancy Gardner to Mrs. Mattie Mitchell. "Exhibits 5 and 6."

Said Deed Exhibit "5" being in words and figures as follows, towit:

"Exhibit 5." Plaintiffs'.

108 "EXHIBIT 5." Plaintiffs'.

"UNITED STATES OF AMERICA,
Indian Territory,
Central District:

Know All Men by These Presents:

That we, Wilson Gardner, Anderson Gardner, and Nancy Gardner, members and allottees of the Choctaw tribe of Indians and the brothers and wife respectively, the sole and only heirs of Wilken Gardner, deceased, who died on the 9th day of December, 1905, for and in consideration of the sum of $911.00, to us in hand paid by Mrs. Mattie Mitchell, the receipt of which is hereby acknowledged,

we have this day and do by these presents, give, grant, bargain, sell and convey unto the said Mrs. Mattie Mitchell, her heirs and assigns, all and singular the following described lands and premises, towit: The E. ½ of N. W. ¼ of N. E. ¼; the S. ½ of N. E. ¼; the N. E. ¼ of S. E. ¼; the N. ½ of N. W. ¼ of S. E. ¼; the S. E. ¼ of N. W. ¼ of S. E. ¼; the N. E. ¼ of N. E. ¼ of S. W. ¼ all in section 6, Tp. 3 South, Range one East, of the Indian Meridian, and consists of 180 acres more or less.

All of said lands being in the Chickasaw Nation, I. T., and said lands being part of the lands selected and allotted by Howard McBride, administrator of the estate of Wilkin Gardner, together with all and singular the improvements thereon situated, and all the rights, privileges, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and all the right, title, claim and interest of the said Wilkin Gardner in and to all and singular said lands and premises as hereinbefore described, and being part of the identical lands as designated by the records of the Commissioner to the Five Civilized Tribes as filed upon, selected and allotted to the said Wilken Gardner, as a member and allottee of the Choctaw Tribe of Indians, and all the right, title and claim and interest of the said Wilken Gardner, in and to all and singular the lands

"Ex. 5," Pltfs.'

hereinbefore described. And we the said Wilson Gardner,
109 Anderson Gardner and Nancy Gardner, the only and sole heirs of the said Wilken Gardner, and we the said and only heirs of Wilken Gardner, grant, bargain, sell and convey unto the said Mrs. Mattie Mitchell, all the right, title, claim and interest that now have or may hereafter acquire in any manner whatsoever to the same.

By this instrument it is entended to convey and we do hereby convey all and singular the said lands and premises hereinbefore described, or such part thereof as the said Wilkin Gardner may be entitled to as an allottee of the Choctaw Tribe of Indians, and being of the same appraised value of the lands described herein, and unto her heirs and assigns, and all of the right, title, claim and interest that we may now have or may or might in any manner hereafter acquire into the same.

To have and to hold all and singular said lands and premises unto the said Mrs. Mattie Mitchell, her heirs and assigns in fee simple forever, and we do for ourselves and our heirs, executors and administrators covenant with, agree with and represent and warrant unto the said Mrs. Mattie Mitchell, her heirs and assigns that the said Wilken Gardner died intestate and without issue of his body, and that we are the sole and only heirs of the said Wilken Gardner, and that we are lawfully seized in fee simple of all and singular said lands and premises; that the same is free and clear of all liens and incumbrances, and that we have a good and lawful right to sell and convey the same as aforesaid, and that we will and that our heirs, executors and administrators shall forever warrant and defend the title and possession of all and singular the said lands and premises

as aforegranted and conveyed unto the said Mrs. Mattie Mitchell, her heirs and assigns, against the claim or claims of all persons whomsoever, and if for any reason the said lands as herein-
110 before described and filed upon selected allotted to the said Wilken Gardner, should be adjudged by any tribunal now in existance or that might be hereafter created not to be the lands of the said Wilken Gardner, then in that event the said Howard McBride, as administrator, or his successors, shall file upon select and file upon other lands of equal appraised value to that described therein, and that all the warranties and covenants herein shall extend to and cover said land so selected filed upon and allotted, and that this conveyance shall extend to and convey all such land and if for any reason it should be necessary for another deed to be executed in order that a title in fee simple may pass to the said Mrs. Mattie Mitchell, then in that event we do for ourselves, our heirs, executors and administrators, represent and warrant unto the said Mrs. Mattie Mitchell, her heirs and assigns that we will execute such a deed conveying the same as aforesaid.

In witness whereof we, Anderson Gardner and Nancy Gardner, have hereunto set our hands and seal on this the 6th day of January, 1906, and Wilson Gardner on the 8th day of January, 1906.

WILSON GARDNER.
ANDERSON GARDNER.
her
NANCY x GARDNER.
mark.

Witnesses:
WASH TOMPSON.
F. A. BONNER.

UNITED STATES OF AMERICA,
Central District,
Indian Territory:

Be it remembered, that on this the 6 day of January, 1906, before me the undersigned, a Notary Public within and for the Central District of the Indian Territory, appeared in person Anderson Gardner and Nancy Gardner, to me personally well known
111 to be the persons whose names appear upon the within and foregoing deed of conveyance as the parties grantors, and stated that they had executed the same for the uses, purposes and considerations herein mentioned and set forth, as their own voluntary act and deed.

In witness whereof I have hereunto set my hand and affixed my seal — office on this the 6 day of January, 1906.

[SEAL.] HOWARD McBRIDE,
Notary Public.

My Commission expires on the — day of Sept., 1909.

UNITED STATES OF AMERICA,
Central District,
Indian Territory:

Be it remembered, that on this the 8th day of January, 1906, personally appeared before me the undersigned Notary Public duly commissioned and acting within and for said District and Territory, Wilson Gardner, to me known as being one of the grantors to the above and foregoing deed, and acknowledged to me that he had executed the said deed for the purposes and considerations therein mentioned and set forth.

In witness whereof, I hereunto set our hand and seal as Notary Public this the 8th day of January, 1906.

[SEAL.] HOWARD McBRIDE,
Notary Public, Central District, Indian Territory."

UNITED STATES OF AMERICA,
Southern District,
Indian Territory:

Certificate of Record.

I, C. M. Campbell, Clerk of the United States Court and ex-officio recorder, *to* hereby certify that the instrument hereto attached was filed for record in my office at Ardmore, Indian Territory,
112 District No. 21, the 20 day of Jan., 1906, at 10 P. M., and duly recorded in Book 30, page 409.

[SEAL.] C. M. CAMPBELL,
Clerk and ex-Officio Recorder.

Filed at Ardmore, for record Jan. 20, 1906, 10 A. M. C. M. Campbell, Clerk and ex-officio Recorder, District No. 21, Ind. Ter."

Said Exhibit "5" affidavit of F. M. Adams, being in words and figures as follows, towit:

"EXHIBIT 6"—PLAINTIFFS.'

STATE OF OKLAHOMA,
Carter County, ss:

I, F. M. Adams, being first duly sworn on oath, state, that I have examined the deed signed by Wilson Gardner, Anderson Gardner and Nancy Gardner to Mrs. Mattie Mitchell, conveying the lands allotted in the name of Wilkin Gardner, deceased, and that said deed conveyed the following described lands, towit: The E. ½ of the N. W. ¼ of N. E. ¼ and S. ½ of N. E. ¼ and N. E. ¼ of S. E. ¼ and N. ½ of N. W. ¼ of S. E. ¼ and S. E. ¼ of N. W. ¼ of S. E. ¼ and N. E. ¼ of N. E. ¼ of S. W. ¼ of section 6, Tp. 3 South,

range one east of the Indian Meridian, and containing of 180 acres more or less.

I further state that there is a provision in said deed *that there is a provision in the deed* to the effect that if said lands so conveyed were lost in contest, then Howard McBride, as administrator,
113 or his successor shall select other lands in lieu thereof, that said deed was recorded in the recording District No. 21 on the 20th day of January, 1906, at 10 o'clock A. M., in Book 30, on page 409.

I further state that I have examined a deed by Wilson Gardner, Anderson Gardner and Nancy Gardner to J. S. Mullen and L. V. Mullen, conveying the following described lands, towit: The E. ½ of N. W. ¼ of S. W. ¼ of section 8, Tw. 5 South range 2 East; also N. W. ¼ of S. W. ¼ of S. E. ¼ of section 3, Tp. 5 South range 2 East; and S. W. ¼ of N. E. ¼ of S. E. ¼ Sec. 34 tp. 4 south range 2 east, which said land was a portion of that allotted in the name of Wilkin Gardner, deceased. That said deed was duly acknowledged and filed for record in the 21st recording district on the 22nd day of May, 1906, in Book 32 on page 423; and that said deed has a provision therein that if the said lands are lost in contest or adjudged not to be the land belonging to Wilkin Gardner, then and in that event Howard McBride as administrator shall have a right to file on other lands of equal appraised value of the above described land.

I further state that I have examined the original patents issued in the name of Wilkin Gardner, and that there was allotted to Wilkin Gardner the following described lands towit: The N. E. ½ of S. E. ½ of S. E. ¼ of sec. 7, tp. 5 South range 2 east, and S. E. ¼ of S. W. ¼ of N. W. ¼ of section 25, tp. 1 south 2 West, and S. E. ¼ of N. W. ¼ of N. E. ¼, and N. ½ of N. W. ¼ of S. W. ¼ of N. E. ¼ of section 23, tp. 8 south, range 2 west and S. W. 10 acres of lot 2 and N. W. ¼ of S. W. ¼ of N. E. ¼ and S. E. ¼ of S. E. ¼ of N. E. ¼ of section 4 tp. 3 north range 7 west, and N. W. 8.36 acres lot 17 of section 18, tp. 4 north range 7 west; and N. W. ¼ of S. W. ¼ of S. E. ¼ of sec. 3, tp. 5 south range 2 east; and N. E. ¼ of N. W. ¼ of S. W. ¼ of sec. 8, tp. 5 south range 7
114 east; and S. W. ¼ of N. E. ¼ of S. E. ¼ of section 34, tp. 4 south range 2 east and 20.06 of lot 3 and N. 20.06 acres of lot 4 of section 7 tp. 1 north range 5 west and S. ½ of N. E. ¼ of S. E. ¼ and S. E. ¼ of S. E. ¼ of section 12, tp. 1 north range 6 west; which land was in lieu of that originally selected in the name of Wilkin Gardner, deceased.

F. M. ADAMS.

Subscribed and sworn to before me this October 7, 1912.

[SEAL.]

E. DUNLAP,
Notary Public.

My Commission expires 1-11-15."

Mr. Ledbetter: The plaintiffs now offer in evidence Exhibit "7," deed from Anderson Gardner, Wilson Gardner and Nancy Gardner

to the plaintiffs J. S. and L. V. Mullen. Dated the 6th day of January, 1906.

Mr. Martin: Objected to as incompetent, irrelevant and immaterial and not tending to prove or disprove any of the issues in this case.

By the Court: Overruled.

Mr. Martin: The defendant- except.

Said Deed "Exhibit 7" being in words and figures as follows, towit:

"Exhibit 7"—Plaintiffs'.

"EXHIBIT 7"—PLAINTIFFS.'

115 "UNITED STATES OF AMERICA,
Central District, Indian Territory:

Know all men by these presents: That we, Wilson Gardner, Anderson Gardner, and Nancy Gardner, members and allottees of the Choctaw Tribe of Indians, and the brothers and wife respectively and the sole and only heirs of Wilken Gardner, deceased, who died on the 9th day of December, 1905, for and in consideration of the sum of $130.30 to us in hand paid by J. S. Mullen and L. V. Mullen, the receipt of which is hereby acknowledged, we do, and by these presents give, grant, bargain, sell and convey unto the said J. S. Mullen and L. V. Mullen, their heirs and assigns, all and singular the following described lands and improvements, to-wit:

E. ½ of N. W. ¼ of S. W. ¼ of Sec. 8, Twp. 5 south range 7 east; also N. W. ¼ of S. W. ¼ of S. E. ¼ of Sec. 3, Twp. 5 S. Range 2 East, and the S. W. ¼ of the N. E. ¼ of S. E. ¼ of Sec. 34, Twp. 4 S. R. 2 East, Indian Meridian, Chickasaw Nation, Indian Territory,

and being a part of the land selected by Howard McBride, administrator of the estate of Wilkin Gardner, together with all and singular the improvements thereon situated, and all the right, priviliges, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and all the right, title, claim and interest that the said Wilkin Gardner, in and to all and singular said lands and premises as hereinbefore described, and being a part of the identical lands as designated and shown by the records of the Commissioner to the Five Civilized Tribes, as filed upon, selected and allotted to the said Wilkin Gardner, as a member and allottee of the Choctaw Tribe of Indians, and all the right, title, claim and interest of the said Wilken Gardner, in and to all and singular any and all improvements located on said land described, and we the said Wilken Gardner, Anderson Gardner, and Nancy Gardner, the only and sole heirs of the said Wilken Gardner, do hereby grant, bargain, sell and convey unto the said J. S. Mullen and L. V. Mullen, all the

right, title and interest that we now have, may or might hereafter have or acquire in any manner whatsoever to the same.

By this instrument it is intended to convey all and singular the said lands and premises hereinbefore described or such part thereof as the said Wilken Gardner may be entitled to as a citizen of the Choctaw Tribe of Indians, being of the same appraised value of the land described herein fee simple forever, unto the said J. S. Mullen and L. V. Mullen, their heirs and assigns, and all the right, title, claim and interest that we may now have or any manner hereafter acquire in and to the same.

To have and to hold all and singular the said lands and premises unto the said J. S. Mullen and L. V. Mullen, their heirs and assigns in fee simple, and we do for ourselves and our heirs, executors and administrators, covenant with and agree with and represent
116 and warrant unto the said J. S. Mullen and L. V. Mullen, that the said Wilken Gardner, died intestate and without issue of his body, and that we are the only and sole heirs of the said Wilken Gardner, and that we are lawfully seized in fee simple of all and singular said lands and premises; that the same are free and clear of all liens and incumbrances, that we have a good and lawful right to sell the same and convey as aforesaid, that we will, and our heirs, executors and administrators shall forever warrant and defend the title and possession of all and singular the said land and premises as aforegranted and conveyed unto the said J. S. Mullen and L. V. Mullen, their heirs and assigns against the claim or claims of all persons whomsoever, and if for any reason the said land hereinbefore filed upon, selected and allotted to the said Wilkin Gardner, shall be adjudged by any tribunal not to be the lands of the said Wilkin Gardner, that in that event the said Howard McBride, or his successor shall select, file upon and allot other lands of equal appraised value of that described herein, and all of the warranties and covenants herein shall extend to and cover said land so selected filed upon and allotted and that this conveyance shall extend to and convey all of said land, and if for any reason it should be necessary for another deed to be executed in order for a title in fee simple to pass to the said J. S. and L. V. Mullen, then in that event we do for ourselves, our heirs, executors and administrators represent and warrant unto the said J. S. and L. V. Mullen, their heirs and assigns that we will execute such a deed conveying the same as aforesaid.

In witness whereof we have hereunto set our hands on this 6th day of January, 1906.

WILSON GARDNER.
ANDERSON GARDNER.
her
NANCY x GARDNER.
mark.

Witnesses:
WASH THOMPSON.
F. A. BONNER.

UNITED STATES OF AMERICA,
Central District, Indian Territory:

Be it remembered, that on this the 6th day of January, 1906, before me the undersigned, a Notary Public, within and for the Central District of the Indian Territory, appeared in person Wilson Gardner, Anderson Gardner and Nancy Gardner, to me personally well known to be the persons whose names appear upon the within and foregoing deed of conveyance as the parties grantor, and
117 state that they had executed the same for the uses, purposes and considerations therein mentioned and set forth, as their own voluntary act and deed.

In witness whereof, I have hereunto set my hand and affixed the seal of office on this the 6th day of January, 1906.

[SEAL.] HOWARD McBRIDE,
Notary Public.

My Commission expires on the — dat of ——, 190–.

UNITED STATES OF AMERICA,
Indian Territory, Southern District:

Be it remembered that on this the 31st day of March, 1906, before me a Notary Public in and for the Southern District aforesaid, personally appeared Frank A. Bonner, one of the subscribing witnesses to the foregoing deed, to me personally well known, who being by me first duly sworn, on his oath stated that he saw Wilson Gardner, Anderson Gardner and Nancy Gardner grantors in the said deed, subscribe said deed on the day of its date, for the uses, purposes and consideration therein mentioned and expressed, and that he and Wash Thompson, the other subscribing witness, subscribed the same as attesting witnesses at the request of said grantors.

In testimony whereof, I have hereunto set my hand, as such Notary Public, on this the 31st day of March, 1906.

[SEAL.] E. DUNLAP,
Notary Public.

UNITED STATES OF AMERICA,
Southern District, Indian Territory:

Certificate of Record.

I, C. M. Campbell, Clerk of the United States Court and ex-officio recorder, do hereby certify that the instrument hereto
118 attached was filed for record in my office at Ardmore, Indian Territory, District No. 21 the 22 day of May, 1906, at 5 P. M., and duly recorded in Book 32, page 423.

Witness my hand and seal of said court in Ardmore in said district, this 24th day of May, 1906.

[SEAL.] C. M. CAMPBELL,
Clerk and ex-Officio Recorder.

Filed May 22, 1906, 5 p. m. C. M. Campbell, Clerk and ex-officio recorder District No. 21, Ind. Ter.

INDIAN TERRITORY,
Central District, at Durant:

I hereby certify that this instrument -as filed for record in my office this 9 day of April, 1906, at 8:40 o'clock A. M. and is duly recorded in record 18, page 174.

[SEAL.]

WM. T. BELL,
Deputy United States Clerk and ex-Officio Recorder District No. 25, Ind. Ter.

Mr. Ledbetter: The plaintiffs now offer in evidence Exhibit Number "8," being plats indicating the lands involved in this suit, together with the written request of Howard McBride, administrator of the estate of Wilkin Gardner, deceased, requesting the Commissioner of the Five Civilized Tribes to allot the land in question to Wilkin Gardner.

Exhibit "8."

119 Mr. Martin: That part of the exhibit proposed to be introduced, which is the request of Howard McBride to select lands as the administrator of Wilkin Gardner, deceased; the defendants object for the reason that same does not purport to be signed and is not signed by Howard McBride and we object on the further grounds that it is incompetent, irrelevant and immaterial, and does not tend to prove or disprove any of the issues in this case.

By the Court. What is the purpose of the exhibit?

Mr. Ledbetter: To show that the allotment was made and allowed on the application of Howard McBride as administrator.

By the Court: The objections *is* overruled.

Mr. Martin: To which the defendants except.

Said Exhibit "8" being in words and figures as follows, to-wit:

EXHIBIT "8," PLAINTIFFS'.

(Here follow plats numbered pp. 120, 121, 122, 123, 124, 125, 126.)

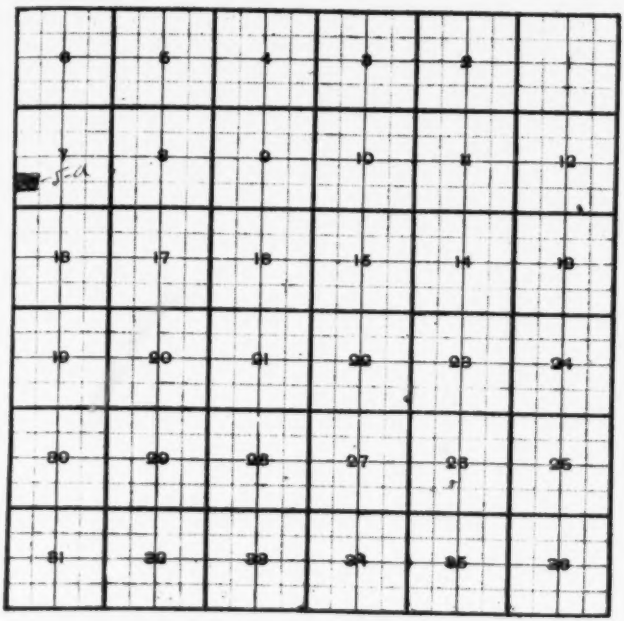
~~Commissioners of the Land Office — State of Oklahoma — Oklahoma City~~

DEPARTMENT OF THE INTERIOR, COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

TOWNSHIP PLAT

Exhibit 8
Pltf's.

Section _____ Township 1-N Range 5-W



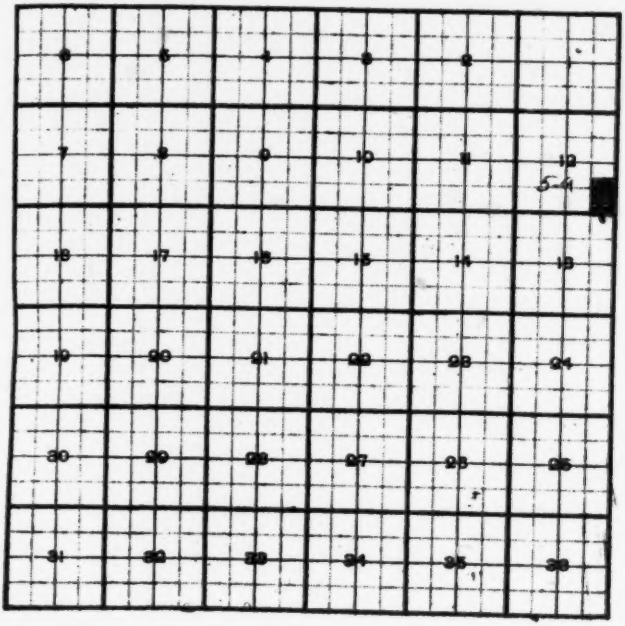
"EXHIBIT 8"-Plaintiffs'.

~~Commissioner of the Land Office — State of Oklahoma — Oklahoma City.~~

DEPARTMENT OF THE INTERIOR, COMMISSIONER TO THE
FIVE CIVILIZED TRIBES.

TOWNSHIP PLAT

Section _____ Township 1-N Range 6-W



EX. 8 contd,

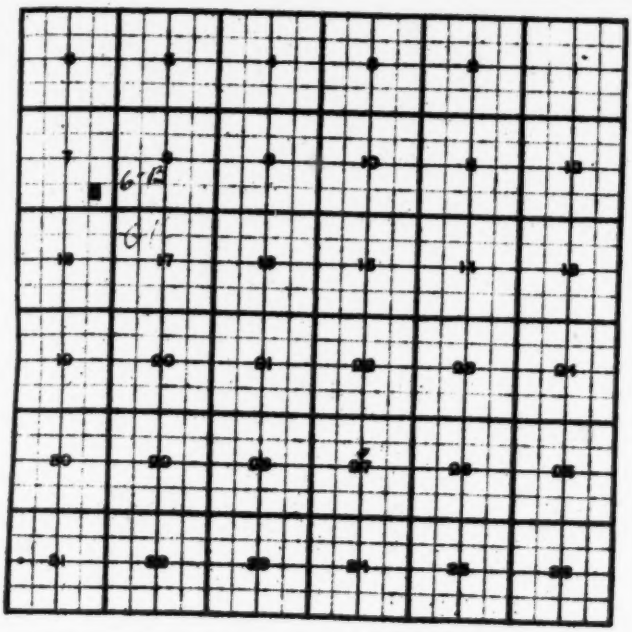
-103-

~~Commissioner of the Land Office — State of Oklahoma — Oklahoma City~~

DEPARTMENT OF THE INTERIOR, COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

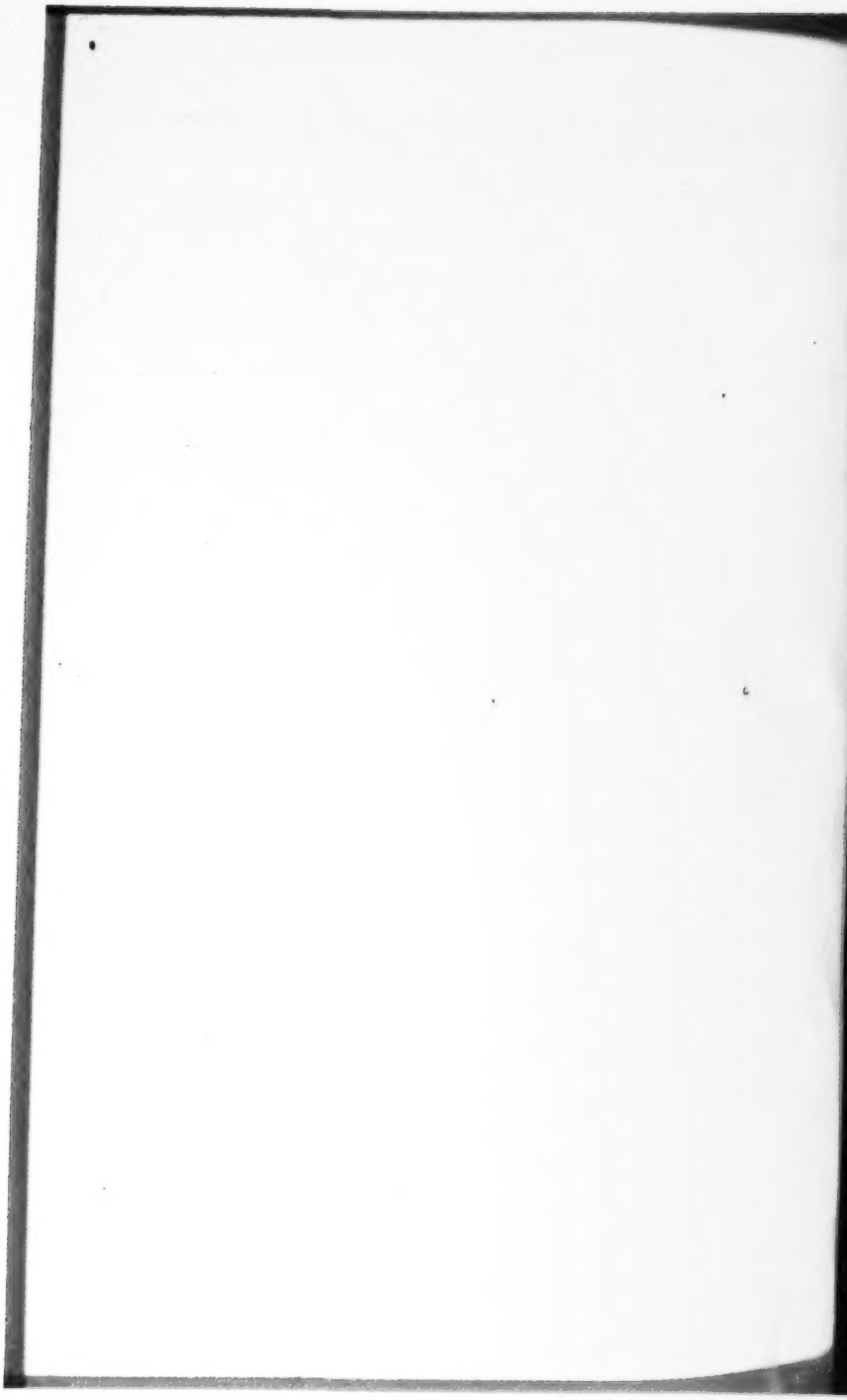
TOWNSHIP PLAT

Section _____ Township 5-E Range 2-E



Ex.8. contd.

22

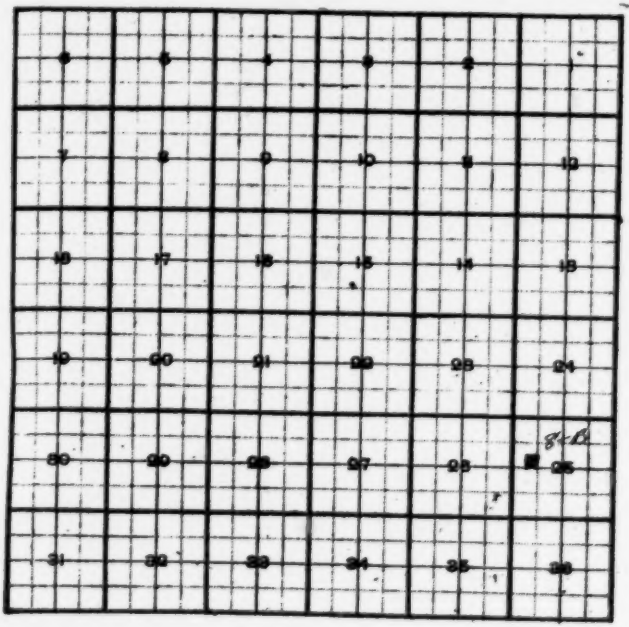


~~Commissioners of the Land Office~~ ~~State of Oklahoma~~ ~~Oklahoma City~~

DEPARTMENT OF THE INTERIOR, COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

TOWNSHIP PLAT

Section_____ Township 1-S Range 2-W



"XX. 8".. contd.

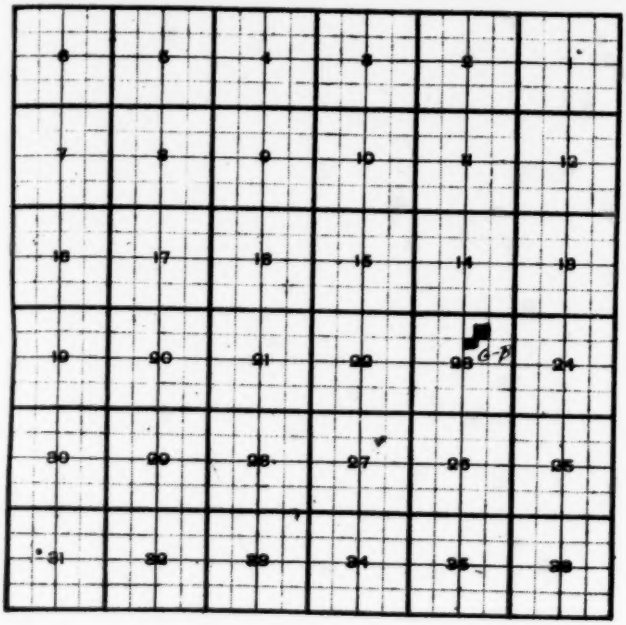
-105-

~~Commissioner of the Land Office — State of Oklahoma — Oklahoma City~~

DEPARTMENT OF THE INTERIOR, COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

TOWNSHIP PLAT

Section _____ Township 8-S Range 2-W



"EX.8" contd.

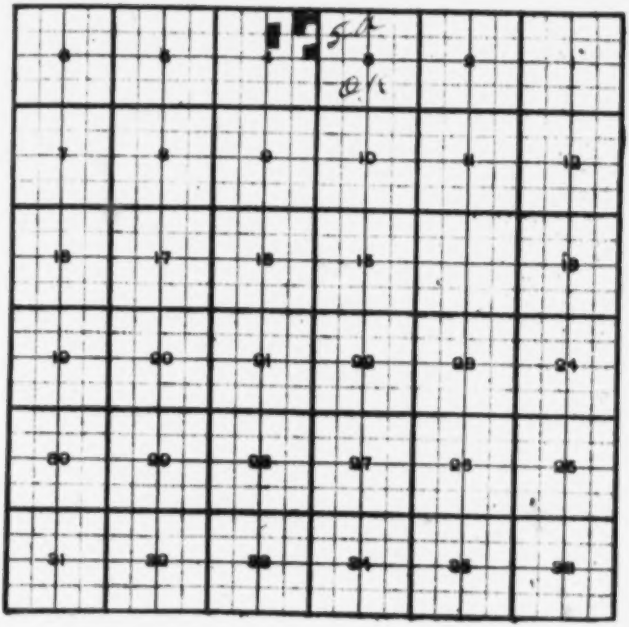
-106-

Commissioners of the Land Office — State of Oklahoma — Oklahoma

DEPARTMENT OF THE INTERIOR, COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

TOWNSHIP PLAT

Section _____ Township 3-N Range 7-W



"EX.8" Contd.

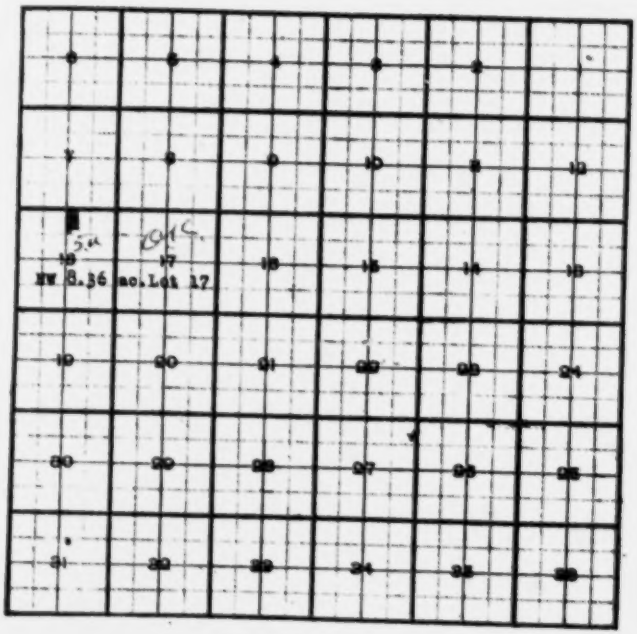
-107-

~~Commissioner of the Land Office — State of Oklahoma — Oklahoma City~~

DEPARTMENT OF THE INTERIOR, COMMISSIONER TO THE
FIVE CIVILIZED TRIBES.

TOWNSHIP PLAT

Section _____ Township 4-N Range 7-W



NW 8.36 ac. Lot 17

"Ex.8" contd.

126

127 Ardmore, Okla.,

Dec. 28, 1908.

Commissioner to the Five Civilized Tribes, Muskogee, Okla.

DEAR SIR: As the administrator of the estate of Wilkin Gardner, deceased, Choctaw Roll No. 3710, I desire to select an allotment lands indicated by the enclosed plats, this in lieu of lands lost in contest.

Yours truly,

H. McBRIDE.

Subscribed and sworn to before me this the 28 day of December, 1908.

[SEAL.] J. O. MULLEN,
Notary Public."

Exhibit "8" continued.

128 Department of the Interior.

Commissioner to the Five Civilized Tribes.

In the Matter of the Allotment of the Lands of the Choctaws and Chickasaws.

Citizens by Blood and Intermarriage.

Chickasaw Nation.

Muskogee, Oklahoma,

Sept. 9, 1910.

Whereas, The enrollment of Wilkin Gardner as a citizen by Blood of the Choctaw Nation was approved by the Secretary of the Interior on the 12 day of December, 1902; and

Whereas, The Choctaw and Chickasaw Land Office of the Commissioner to the Five Civilized Tribes have been opened for the reception of applications for allotments for a period of over one year to the date hereof; and

Whereas, the said Wilkin Gardner, has not heretofore selected or had selected for him an allotment of the lands of the Choctaw and Chickasaw Nations; and

Whereas, it was provided by the Act of Congress approved July 1, 1902 (32 Stats., 641), and ratified by the citizens of the Choctaw and Chickasaw Nations September 25, 1902, as follows:

"If any citizen or freedman of the Choctaw and Chickasaw Nations shall not have selected his allotment within twelve months after the date of the opening of said land office in said nations, if not herein otherwise provided, and provided that twelve months shall have elapsed from the date of the approval of his enrollment by the Secretary of the Interior, then the Commission to the Five Civilized Tribes may immediately proceed to select an allotment, including a

homestead for such person, said allotment and homestead to be selected as the Commission may deem for the best interest of said person, and the same shall be of the same force and effect as if such selection had been made by such citizen or freedman in person, and all lands held or claimed by persons for whom allotments have been selected by the Commission as provided, and in excess of the
129 amount included in said allotments, shall be a part of the public domain of the Choctaw and Chickasaw Nations and be subject to disposition as such."

Now, therefore, the Commissioner to the Five Civilized Tribes, in accordance with the provisions of the Act of Congress approved July 1, 1902, (32 Stats. 641), above quoted, has this day selected as an allotment of the lands of the Choctaw and Chickasaw Nations including a homestead for the said Wilkin Gardner, the following described land:

Homestead.

Roll, Choc. No. BB3710.

Subdivision Rx. 97.50.	Sec.	Town.	Range.	Acres.	Appraised value.	Certif. No.
S. 20.06 Ac. of Lot 3.....	7	1 N.	5 W.	20.06	100.30	
N. 20.06 Ac. of Lot 4.....	"	"	"	20.06	100.30	
S. ½ of N. E. ¼ of S. E. ¼...	12	1 N.	6 W.	20.	100.	
S. E. ¼ of S. E. ¼.....	"	"	"	40.	200.	19021

The following described land exclusive of the Homestead is allotted:

N. E. ¼ of S. E. ¼ of S. E. ¼	7	2 S.	2 E.	10	32.50	28266
S. E. ¼ of S. W. ¼ of N. W. ¼	25	1 S.	2 W.	10	15.	28267
S. E. ¼ of N. W. ¼ of N. E. ¼	23	8 S.	2 W.	10	32.50	
N. ½ of N. W. ¼ of S. W. ¼ of N. E. ¼.....	23	"	"	5	16.25	28267
N. 19.97 Ac. of Lot 1.....	4	3 N.	7 W.	19.97	99.85	
S. W. 10 Ac. of Lot 1.....	"	"	"	10	50.	
S. W. 10 Ac. of Lot 2.....	"	"	"	10	50.	
N. W. ¼ of S. W. ¼ of N. E. ¼	"	"	"	10	50	
S. E. ¼ of S. E. ¼ of N. E. ¼	"	"	"	10	50	28269
N. W. 8.36 Ac. of lot 17.....	10	4 N.	"	8.36	41.80	28270
Total appraised value.....					938.50	

COMMISSIONER TO THE FIVE CIVILIZED TRIBES.
J. GEO. WRIGHT.
D. H. B."

H." 24-127.

"Exhibit 8 continued.

130 "Exhibit 8 continued.

Department of the Interior.

Commissioner to the Five Civilized —.

Muskogee, Oklahoma,

April 12, 1913.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the application for the allotment of land in the Choctaw and Chickasaw Nations for Wilkin Gardner, Choctaw by Blood, Roll No. 3710, on September 9, 1910.

J. G. WRIGHT,
Commissioner to the Five Civilized Tribes.

C. D. D."

End of Ex. 8.

Plaintiff's Evidence Continued.

Mr. Ledbetter: The plaintiffs now offer in evidence Exhibits Nine (9) to Fourteen (14) inclusive, being Allotment and Homestead Certificates issued to Wilkin Gardner being the original allotment certificates.

Said allotment certificates, Exhibits 9, 10, 11, 12, 13 and 14, being in words and figures, and appearing in their numerical order, as follows, towit:

131 "EXHIBIT 9," PLAINTIFFS'.

Allotment Certificate.

Department of the Interior.

Roll Choc. BB.
No. 3710.
Certificate No. 28270.

Chickasaw Land Office,
Sept. 9, 1910.

Commission to the Five Civilized Tribes.

In the Matter of the Allotment of the Lands of the Choctaws and Chickasaws.

Citizens by Blood and Intermarriage.

This is to certify that Wilkin Gardner has this day been allotted the following described land, exclusive of a Homestead, viz: N. W.

8.36 ac. Lot 17, Sec. 18, Town. 4 N. Range 7 W. 8.38 Acres, of the Indian base and meridian, containing 8.36 acres more or less as the case may be according to the United States Survey thereof.

Total appraised value of the land described in this certificate $41.80.

Chickasaw Nation.

This certificate is not transferrable.

J. G. WRIGHT,
Commissioner to the Five Civilized Tribes.

"EXHIBIT 10," PLAINTIFFS'.

Allotment Certificate.

Department of the Interior.

Commissioner to the Five Civilized Tribes.

Roll Choctaw B. B.
No. 3710.
Certificate No. 28269.

Chickasaw Land Office,
Sept. 9, 1910.

In the Matter of the Allotment of the lands of the Choctaws and Chickasaws.

Citizens by Blood and Intermarriage.

This is to certify that Wilkin Gardner has this day been allotted the following described land, exclusive of a homestead, viz:

N. 19.97 Ac. of Lot 1	Sec.	4	Town	3	N. Range	7	W.	19.97 Acres.
S. W. 10 Ac. of Lot 1	"	"	"	"	"	"	"	10
S. W. 10 Ac. of Lot 2	"	"	"	"	"	"	"	10
N. W. ¼ of S. W. ¼ of N. E. ¼	"	"	"	"	"	"	"	10

132 S. E. ½ of S. E. ¼ of N. E. ¼ Sec. 4 Town 3 N. Range 7 W. 10 acres of the Indian base and meridian, containing 59.97 acres more or less, as the case may be, according to the United States survey thereof.

Total appraised value of the land described in this Certificate. $299.85.

Chickasaw Nation.

This certificate is not Transferrable.

J. GEO. WRIGHT,
Commissioner to the Five Civilized Tribes."

"EXHIBIT 11," PLAINTIFFS'.

Allotment Certificate.

Department of the Interior,

Commissioner to the Five Civilized Tribes.

Roll Choctaw B. B.
No. 3710.
Certificate No. 28268.

Chickasaw Land Office,

Sept. 9, 1910.

In the Matter of the Allotment of the Lands of the Choctaws and Chickasaws.

Cittizens by Blood and Intermarriage.

This is to certify that Wilkin Gardner has this day been allotted the following described land, exclusive of a homestead, viz:

S. E. ½ of N. W. ¼ of
N. E. ¼ ..... Sec. 23, Town. 8 S. Range 2 W. 10 acres.
N. ½ of N. W. ¼ of S.
W. ½ of N. E. ¼ ..... " " " " " " " 5 "

of the Indian base and meridian, containing 15 acres, more or less as the case may be, according to the United States survey thereof. Total appraised value of the land described in this certificate: $48.75.

Chickasaw Nation.

This Certificate is not transferable."

J. GEO. WRIGHT,
Commissioner to the Five Civilized Tribes."

133 "EXHIBIT 12," PLAINTIFFS'.

Allotment Certificate.

Department of the Interior.

Commissioner to the Five Civilized Tribes.

Roll Choctaw BB.
No. 3710.
Certificate No. 28267.

Sept. 9, 1910.

In the Matter of the Allotment of the Lands of the Choctaws and Chickasaws.

Citizens by Blood and Intermarriage.

This is to certify that Wilkin Gardner, has this day been allotted the following described land, exclusive of a homestead, viz: S. E. ¼ of S. W. ¼ of N. W. ¼ Sec. 25, Town. 1 S. Range 2 W. 10 acres, of the Indian base and meridian, containing 10 acres, more or less, as the case may be, according to the United States survey thereof. Total appraised value of the land described in this certificate: $15.00.

Chickasaw Nation.

This certificate is not transferable.

J. GEO. WRIGHT,
Commissioner to the Five Civilized Tribes."

"EXHIBIT 13," PLAINTIFFS'.

"Allotment Certificate.

Department of the Interior.

Commissioner to the Five Civilized Tribes.

Roll Choc. BB.
No. 2710.
Certificate No. 28266.

Chickasaw Land Office,
Sept. 9, 1910.

In the Matter of the Allotment of the Lands of the Choctaws and Chickasaws.

Citizens by Blood and Intermarriage.

This certifies that Wilkin Gardner has this day been allotted the following described land, exclusive of a homestead, viz: N. W. ¼ of

S. E. ¼ of S. E. ¼ of sec. 7, Town 5 S. Range 2 E. 10 acres of the Indian base and meridian, containing 10 acres, more or less, as the case may be, according to the United States survey thereof.
134 Total appraised value of the land contained in this certificate: $32.50.

Chickasaw Nation.

This certificate is not transferable."

J. GEO. WRIGHT,
Commissioner to the Five Civilized Tribes.

"EXHIBIT 14," PLAINTIFFS'.

Homestead Certificate.

Department of the Interior.

Commissioner to the Five Civilized Tribes.

In the Matter of the Allotment of the Lands of the Choctaws and Chickasaws.

Citizens by Blood and Intermarriage.

Roll Choc. Bb.
No. 3710.
Certificate No. 19621.

Chickasaw Land Office,

Sept. 9, 1910.

This certifies that Wilkin Gardner has this day been allotted as a homestead, the following described land, viz:

S. 20.06 ac. of Lot 3 Sec.	7,	Town	1	N.	Range	5	W.	20.06 Acres.
N. 20.06 ac. of Lot 4 "	"	"	"	"	"	"		20.06 "
S. ½ of N. E. ¼ of S. E. ¼ . . . . . "	12	"	1	N.	"	6	W.	20.00
S. E. ¼ of S. E. ¼ "	"	"	"	"	"	"		40.00

of the Indian base and meridian, containing 100.12 acres, more or less, as the case may be, according to the United States Survey thereof. Total appraised value of the land described in this certificate: $500.60.

Chickasaw Nation.

This certificate is not transferable."

J. GEO. WRIGHT,
Commissioner to the Five Civilized Tribes."

Plaintiffs' Evidence Continued.

Mr. Ledbetter: The plaintiffs now offer in evidence the original Allotment and Homestead Patents, "Exhibits 15, 16 and 17."

Said patents, Exhibits 15, 16 and 17, being in words and figures as follows, towit: Appearing hereinafter in their numerical order as offered.

135 Choctaw and Chickasaw Nations.

Homestead Patent.

Record —.
Page —.
To —— ——,
Choctaw by Blood.
Dated (as below).
Filed —.
Roll No. 3710.
Allotment Patent No. 33815.
Date of Certificate September 9, 1910.

The Choctaw and Chickasaw Nations,

(Formerly Indian Territory), Oklahoma.

To All to Whom These Presents Shall Come, Greeting:

Whereas, by the Act of Congress approved July 1, 1902 (32 Stats., 641) and ratified by the citizens of the Choctaw and Chickasaw Nations September 25, 1902, it was provided that there should be allotted, by the Commission to the Five Civilized Tribes, to each citizen of the Choctaw and Chickasaw Nations land equal in value to three hundred and twenty acres of the average allottable lands of the Choctaw and Chickasaw Nations; and,

Whereas, it was provided by said Act of Congress that each member of said tribes shall, at the time of the selection of his allotment, designate, or have selected and designated for him, from his allotment, land equal in value to one hundred and sixty acres of the average allottable land of the Choctaw and Chickasaw Nations, as nearly as may be, as a homestead, for which separate certificate and patent shall issue, and,

Whereas, the said Commission to the Five Civilized Tribes, or its lawful successor, has certified that the land hereinafter described has been selected by or on behalf of Wilkin Gardner, a citizen of the

Choctaw Nation, as an allotment exclusive of land equal in value to 160 acres of the average allottable lands of the Choctaw & Chickasaw Nations selected as a homestead as aforesaid;

Now, therefore, we, the undersigned, the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, by virtue of the power and authority vested in us by the twenty-ninth section of the Act of Congress of the United States, approved June 28, 1898 (30 Stat., 495), have granted and conveyed, and by these presents do grant and convey unto the said Wilkin Gardner all the right, title, and interest of the Choctaw and Chickasaw Nations, and of all other citizens of said Nations, in and to the following described land, viz: The N. W. ¼ of S. E. ¼ of S. E. ¼ of section seven (7), Township five (5) South, Range Two (2) East, and S. E. ¼ of S. W. ¼ of N. W. ¼ of section Twenty-five (25), Township one (1) South, and range Two (2) West, and S. E. ¼ of N. W. ¼ of N. E. ¼, and N. ½ of N. W. ¼ of S. W. ¼ of N. E. ¼ of Section Twenty-three (23), Township Eight (8) South, and range Two (2) West, and North Nineteen and Ninety-seven one-hundredths (19.97) acres of Lot one (1) and S. W. 10 acres of Lot one (1) and S. W. 10 acres of Lot two (2), and N. W. ¼ *quarter* of S. W. ¼ of N. E. ¼, and S. E. ¼ of S. E. ¼ of N. E. ¼ of sec. 4, tp. 3 N. R. 7 W., and N. W. 8.36 acres of lot 17 of Sec. 18, Twp. 4 N. and range seven (7) West (Chickasaw Nation), of the Indian Base and meridian, in Indian Territory, containing One hundred and three and thirty-three one-hundredths (103.33) acres more or less, as the case may be, according to the United States survey thereof, subject, however, to the conditions provided by the Act of Congress approved July 1, 1902 (32 Stat. 641).

In witness whereof, we, the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, have hereunto set our hands and caused the great seal of our respective Nations to be affixed at the dates hereinafter shown.

Dated Sep. 20, 1911.

[Seal of Choctaw Nation.]

VICTOR M. LOCKE, JR.,
Principal Chief of the Choctaw Nation.

Dated Sept. 18, 1911.

[Seal of the Chickasaw Nation.]

DOUGLASS H. JOHNSON,
Governor of the Chickasaw Nation.

Department of the Interior.

Approved Oct. 5, 1911.

WALTER L. FISHER, *Secretary,*
By M. E. NETHERLAND, *Clerk.*

"Exhibit 15," Plaintiffs'.

Filed for record this — day of ——, 19—, at — o'clock — M., and recorded in Book — page — at Muskogee.

136 Endorsements on back as follows: Allotment Patent No. 33815. Indexed. Choctaw and Chickasaw Nations to Wilkin Gardner. Filed for record on the 17 day of Oct., 1911, at 4 o'clock P. M., and recorded in Book 57, page 272. J. G. Wright, Commissioner to the Five Civilized Tribes, by Wm. T. Martin, Clerk.

Exhibit 16 being in words and figures as follows towit:

"EXHIBIT 15."

137 Choctaw and Chickasaw Nations.

Homestead Patent.

Record —.
Page —.
To —— ——.
Choctaw by Blood.
Dated (as below).
Filed —.
Roll No. 3710.
Allotment Patent No. 33825.
Date of Certificate January 3, 1906.

The Choctaw and Chickasaw Nations,

(Formerly Indian Territory), Oklahoma.

To All to Whom These Presents Shall Come, Greeting:

Whereas, by the Act of Congress approved July 1, 1902 (32 State., 641) and ratified by the citizens of the Choctaw and Chickasaw Nations September 25, 1902, it was provided that there should be allotted, by the Commission to the Five Civilized Tribes, to each citizen of the Choctaw and Chickasaw Nations land equal in value to three hundred and twenty acres of the average allottable lands of the Choctaw and Chickasaw Nations; and,

Whereas, it was provided by said Act of Congress that each member of said tribes shall, at the time of the selection of his allotment, designate, or have selected and designated for him, from his allotment, land equal in value to one hundred and sixty acres of the average allottable land of the Choctaw and Chickasaw Nations, as nearly as may be, as a homestead, for which separate certificate and patent shall issue, and,

Whereas, the said Commission to the Five Civilized Tribes, or its lawful successor, has certified that the land hereinafter described has been selected by or on behalf of Wilkin Gardner, a citizen of the Choctaw Nation, as an allotment, exclusive of land equal in value to 160 acres of the average allottable lands of the Choctaw and Chickasaw Nations, selected as a homestead as aforesaid.

Now, therefore, we, the undersigned, the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, by virtue of the power and authority vested in us by the twenty-ninth section of the Act of Congress of the United States, approved June 28, 1898 (30 Stat., 495), have granted and conveyed, and by these presents do grant and convey unto the said Wilkin Gardner all the right, title, and interest of the Choctaw and Chickasaw Nations, and of all other citizens of said Nations, in and to the following described land, viz:

The North West quarter of the South west quarter of the south east quarter of section three (3), township five (5) south, and range two (2) east and the North east quarter of the North west quarter of the south west quarter of Section eight (8), Township five (5) south, and range seven (7) east, and the south west quarter of the North east quarter of the south east quarter of Section Thirty-four (34), Township Four (4) South, and Range Two (2) East, (Chickasaw Nation) of the Indian Base and Meridian, in Indian Territory, containing Thirty (30) acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the conditions provided by the Act of Congress approved July 1, 1902 (32 Stat., 641).

In witness whereof, we the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, have hereunto set our hands and caused the great seal of our respective Nations to be affixed at the dates hereinafter shown.

Dated Sep. 20, 1911.

[Seal of Choctaw Nation.]

VICTOR M. LOCKE, Jr.,
Principal Chief of the Choctaw Nation.

Dated Sept. 18, 1911.

[Seal of the Chickasaw Nation.]

DOUGLASS H. JOHNSTON,
Governor of the Chickasaw Nation.

Department of the Interior.

Approved Oct. 5, 1911.

WALTER L. FISHER, *Secretary,*
By M. E. NETHERLAND, *Clerk.*

"Exhibit 16," Plaintiffs'.

Filed for record this — day of ——, 19—, at — o'clock — M., and recorded in Book —, page —, at Muskogee.

138 Endorsements on back: Allotment patent No. 33825. Indexed. Choctaw and Chickasaw Nations to Wilkin Gardner. Filed for record on the 17 day of Oct., 1911, at 4 o'clock P. M., and recorded in Book 57, page 282. J. G. Wright, Commissioner to the Five Civilized Tribes, by Wm. T. Martin, Clerk."

Said Exhibit 17 being in words and -gires as follows, towit:

"Exhibit 17"—Plaintiffs'.

139 Choctaw and Chickasaw Nations.

Homestead Patent.

Record —.
Page —.
To —— ——.
Choctaw by Blood.
Dated (as below).
Filed —.
Homestead Patent No. 26340.
Roll No. 3710.
Date of Certificate September 9, 1910.

The Choctaw and Chickasaw Nations,

(Formerly Indian Territory), Oklahoma.

To all to whom these presents shall come, Greeting:

Whereas, By the Act of Congress approved July 1, 1902 (32 Stat., 641), and ratified by the citizens of the Choctaw and Chickasaw Nations September 25, 1902, it was provided that there should be allotted, by the Commission to the Five Civilized Tribes, to each citizen of the Choctaw and Chickasaw Nations land equal in value to three hundred and twenty acres of the average allottable lands of the Choctaw and Chickasaw Nations; and,

Whereas, it was provided by said Act of Congress that each member of said tribes shall, at the time of the selection of his allotment, designate, or have selected and designated for him, from his allotment, land equal in value to one hundred and sixty acres of the average allottable land of the Choctaw and Chickasaw Nations, as nearly as may be, as a homestead, for which separate certificate and patent shall issue; and,

Whereas, The said Commission to the Five Civilized Tribes, or its lawful successor, has certified that the land hereinafter described has been selected by or on behalf of Wilkin Gardner a citizen of the Choctaw Nation, as a homestead.

Now, therefore, we, the undersigned, the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, by virtue of the power and authority vested in us by the twenty-ninth section of the Act of Congress of the United States, approved June

28, 1898 (30 Stat., 495), have granted and conveyed, and by these presents do grant and convey unto the said Wilkin Gardner all the right, title, and interest of the Choctaw and Chickasaw Nations, and of all other citizens of said Nations, in and to the following described land, viz:

The South Twenty and Six One Hundredths (20.06) acres of Lot Three (3) and the North Twenty and Six One Hundredths (20.06) acres of Lot Four (4) of Section Seven (7), Township One (1) North, and Range Five (5) West, and the South Half of the North East Quarter of the South East Quarter and the South East Quarter of the South East Quarter of Section Twelve (12), Township One (1) North, Range Six (6) West, (Chickasaw Nation)

of the Indian Base and Meridian, in Indian Territory, containing One Hundred and Twelve One-hundredths (100.12) acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the conditions provided by the Act of Congress approved July 1, 1902 (32 Stat., 641), pertaining to allotted homesteads.

In witness whereof, We, the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, have hereunto set our hands and caused the great seal of our respective Nations to be affixed at the dates hereinafter shown.

Dated Sept. 20, 1911.

[Seal of Choctaw Nation.]

VICTOR M. LOCKE, JR.,
Principal Chief of the Choctaw Nation.

Dated Sept. 18, 1911.

[Seal of the Chickasaw Nation.]

DOUGLASS H. JOHNSTON,
Governor of the Chickasaw Nation.

Department of the Interior.

Approved Oct. 5, 1911.

WALTER L. FISHER, *Secretary,*
By M. E. NETHERLANDS, *Clerk.*

"Exhibit 17," Plaintiffs'.

Filed for record this — day of ——, 19—, at — o'clock — M., and recorded in Book —, page —, at Muskogee.

140 Endorsements on back as follows: Homestead Patent. Indexed. Choctaw and Chickasaw Nations to Wilkin Gardner. Filed for record on the 17 day of Oct., 1911, at 4 o'clock P. M., and

recorded in Book 43, page 461. J. Geo. Wright, Commissioner to the Five Civilized Tribes, by Wm. T. Martin, Clerk.

STATE OF OKLAHOMA,
County of Stephens, ss:

This instrument was filed for record on Oct. 8, 1912, at 8 o'clock A. M., and duly recorded in Book 44, of Misc. D. R. *of* page 169.

[SEAL.] R. W. KING,
Register of Deeds,
By E. McCUNE, *Deputy.*

J. S. MULLEN, *Ard.*

Plaintiffs' evidence continued:

Mr. Ledbetter: The Plaintiff now offers in evidence, "Exhibit 18," deed from Mrs. Mattie Mitchell to J. S. Mullen and W. M. Bonner, Exhibit "18."

Said deed is in words and figures as follows, towit:

"Exhibit 18," Plaintiffs':

141 "EXHIBIT 18"—PLAINTIFFS'.

"Warranty Deed.

STATE OF OKLAHOMA,
Carter County, ss:

This indenture, made this 16th day of September, 1912, between Mrs. Mattie Mitchell, of Johnston County, Oklahoma, party of the first part and W. M. Bonner and J. S. Mullen, parties of the second part, Witnesseth:

That said party of the first part in consideration of the sum of One dollar cash in hand paid, and other valuable considerations, the receipt whereof is hereby acknowledged, does by these presents, grant, bargain, sell and convey unto the said parties of the second part, their heirs and assigns, all the following described real estate situate in the State of Oklahoma, to wit:

N. W. ¼ of S. E. ¼ of S. E. ¼ of sec. 7, tp. 5 South, range 2 east, and S. E. ¼ of S. W. ¼ of N. W. ¼ of section 25, tp. 1 South, range 2 West, and S. E. ¼ of N. W. ¼ of N. E. ¼, and N. ½ of N. W. ¼ of S. W. ¼ of N. E. ¼ of section 23, tp. 8 South, range 2 west, and N. 19.97 acres of lot 1, and S. W. 10 acres of lot 1, and S. W. 10 acres of lot 2 and N. W. ¼ of S. W. ¼ of N. E. ¼ and S. E. ¼ of S. E. ¼ of N. E. ¼ of sec. 4, tp. 3 North, range 7 west, and N. W. 8.36 acres of lot 17 of sec. 18, tp. 4 North, range 7 west, and south 20.06 acres of lot 3 and north 20.06 acres of lot 4 of Sec. 7, tp. 1 North, range 5 west, and S. ½ of N. E. ¼ of S. E. ¼, and S. E. ¼ of S. E. ¼ of section 12, tp. 1 North, range 6 west;

To have and to hold the same together with all and singular the tenaments, hereditaments and appurtenances thereunto belonging, or in any wise appeartaining forever.

Party of the first part for her heirs, executors and administrators, does hereby covenant, warrant, promise, and agree to and
142 with the said parties of the second part, that at the time of the delivery of these presents, she is lawfully seized in her own right of an absolute estate of inheritance of and in all and singular the above granted and described premises, and that she will defend the same unto the said *party* of the second part, their heirs and assigns against said party of the first part, and her heirs and all and every person, or persons claiming the same by, through or under her. It is intended by this conveyance that said W. M. Bonner and J. S. Mullen shall have all the rights, and covenants, agreements and covenants to convey, as recited in the conveyance as of date the 6th day of January, 1906, by Wilkin Gardner, Anderson Gardner and Nancy Gardner to Mrs. Mattie Mitchell, filed of record at Ardmore, January 20, 1906, and recorded on 20th day of January, 1906, in Book 30, page 409.

To have and to hold the same unto the said parties of the second part, their heirs, and assigns.

In witness whereof, the said *parties* of the first part has hereunto set her hand, the day and year first above written.

MATTIE S. MITCHELL.

STATE OF OKLAHOMA,
County of Johnston, ss:

Before me, J. O. Mullen, a Notary Public, in and for said County and State, on this 16 day of September, 1912, personally appeared Mrs. Mattie Mitchell, to me known to be the identical person who executed the within and foregoing instrument and acknowl-
143 edged to me that she executed the same as her free and voluntary act and deed and for the uses and purposes therein set forth.

Witness my hand and notarial seal the day and year last above written.

J. O. MULLEN,
Notary Public.

Seal of J. O. Mullen, Notary Public, Carter County, Oklahoma, attached.

My Commission expires 1/10/13."

Plaintiffs' evidence continued:

Mr. Ledbetter: The plaintiffs now offer in evidence Exhibit "19," deed from W. M. Bonner to J. S. Mullen.

Said deeds is in words and figures as follows, towit:

"EXHIBIT 19"—PLAINTIFFS'.

"Warranty Deed.

STATE OF OKLAHOMA,
Carter County:

This indenture, made this 1st day of Oct., 1912, A. D., *191—*, between W. M. Bonner of —— County, in the State of Oklahoma, party of the first part, and J. S. Mullen, party of the second part,

Witnesseth, That said party of the first part*y* in consideration of the sum of One Thousand Dollars ($1,000.00), the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell and convey unto the said party of the second part, his heirs and assigns, all the following described real estate situated in various counties of State of Oklahoma, towit:

144 N. W. ¼ of S. E. ¼ of S. E. ¼ of Sec. 7, tp. 5, S. R. 2 E.; S. E. ¼ of S. W. ¼ of N. W. ¼ of Sec. 25, tp. 1, S. R. 2 W.; S. E. ¼ of N. W. ¼ of N. E. ¼; and N. ½ of N. W. ¼ of S. W. ¼ of N. E. ¼ of Sec. 23, tp. 8 S. R. 2 W.; N. 19.97 acres of lot 1, and S. W. 10 acres of lot 1, S. W. 10 acres of lot 2; N. W. ¼ of S. W. ¼ of N. E. ¼; and S. E. ¼ of S. E. ¼ of N. E. ¼ of sec. 4, tp. 3 N. R. 7 W.; and N. W. 8.36 acres of lot 17 of sec. 18, tp. 4 N. R. 7 W.; S. 20.06 acres of lot 3 and N. 20.06 acres of lot 4, of sec. 7, tp. 1, N. R. 5 W.; and S. ½ of N. E. ¼ of S. E. ¼, and S. E. ¼ of S. E. ¼ of sec. 12, tp. 1 N. R. 6 W.

To have and to hold the same, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, forever.

Party of the first part, for his heirs, executors and administrators, does hereby covenant, warrant, promise and agree to and with said party of the second part, that at the time of the delivery of these presents he is lawfully seized in his own right of an absolute and indefeasable estate of inheritance in fee simple, of and in all and singular the above granted and described premises with all the appurtenances that the same are free, clear, discharged and unincumbered, of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and incumbrances of what nature or kind whatsoever, and that he will warrant and forever defend the same unto said party of the second part, his heirs and assigns, against said party of the first part, his heirs, and all and every person or persons whomsoever lawfully claiming or to claim the same; and that no part of said lands and premises is used or claimed as a homestead.

In witness whereof, the said party of the first part has hereunto set his hand the day and year first above written.

145 "(Signed) W. M. BONNER.

Witnesses:

—— ——.

—— ——.

STATE OF OKLAHOMA,
County of Carter:

Before me, F. M. Adams, a Notary Public in and for said County and State, on this 1 day of October, 1912, personally appeared W. M. Bonner, to me known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set for*ht*.

Witness my hand and official seal, the day and year above written.
[SEAL.] F. M. ADAMS,
Notary Public.

My Commission expires Jan. 11, 1915."

Mr. Ledbetter: If the court please, the pleadings in this case show that the plaintiff is in possession of the lands in question, and I presume it is admitted by the defendants at this time.

By the Court: Let the record show that it is admitted that the plaintiff is in possession of the lands in controversy.

Mr. Ledbetter: *It* believe it is also admitted that Wilkin Gardner died in the fall of 1905, and that at the time of his death he
146 left surviving him as his sole and only heirs the parties who signed the original deeds of the plaintiff to the respective grantees as shown by the plaintiffs' exhibits introduced in evidence in this case; the heirs being Wilson Gardner, Anderson Gardner and Nancy Gardner, Nancy Gardner being the wife of Wilkin Gardner, deceased. The deed referred to above is dated January 6th, 1906.

Mr. Ledbetter: It is further admitted that Wilson Gardner died in February of this year, 1913, and that Wilson Gardner left surviving him as his heir Lena Gardner, his widow, and Anderson Gardner, his brother, Anderson Gardner being the co-defendant in this case. It is further admitted that these last named heirs executed a deed, warranty deed, covering the lands in controversy, to J. W. or W. J. Whiteman and that such deeds were recorded in the office of the Register of deeds during the month of February, 1913.

By the Court: Anything further for the plaintiff?

Mr. Ledbetter: No, sir; that's the plaintiffs' case, if the court please.

Plaintiffs having rested, the following proceedings were thereupon had in said cause:

Demurrer to Evidence.

Mr. Martin: Comes now the defendants and demurs to the evidence of the plaintiff-, for the reason that the same discloses that all of the allotments of Wilkin Gardner, deceased, except thirty acres thereof, was tribal lands of the Choctaw and Chickasaw Na-

147 tions and in the sole control of the Department of the Interior for the purpose of allotment and disposition until the 9th day of September, 1910, and the plaintiffs claim such lands by virtue of a contract or covenant on the part of the defendants executed on the 6th day of January, 1906, at a time when such lands were not selected or designated for Wilkin Gardner, deceased, and at said time said grantors therein, the Gardners, had no interest in said lands that they could convey or could contract to convey, and that to do so was to attempt to convey lands that belonged to the Choctaw and Chickasaw Tribes of Indians and in the hands of the government of the United States for allotment purposes.

By the Court: Let the record show that ruling is reserved on the Demurrer at this time.

Mr. Martin: To which the defendants except.

By the Court: *Has* the defendants any evidence?

Mr. Martin: Yes, sir.

By the Court: Call the first witness for the defendants.

Mr. Martin: Call Howard McBride.

Thereupon, the defendants offered in said cause the following evidence:

Defendants' Evidence.

Howard McBride called:

148 HOWARD MCBRIDE, being duly sworn as a witness, testified as follows:

Examination by Mr. Brown, attorney for the defendants:

Q. State your name to the Court?

A. Howard McBride.

Q. I will ask you to state whether or not on the 3rd day of January, 1906, you appeared before the Land Office at Muskogee as administrator of the estate of Wilkin Gardner, deceased?

A. I appeared before a branch of the Department at Muskogee as administrator about that time, about that date.

Q. Before that time had you been appointed administrator of the estate of Wilkin Gardner, deceased?

A. Yes, sir.

Q. Who selected the lands which you asked to be filed at that time?

A. I went and looked over them and viewed the lands.

Q. At whose request?

Mr. Ledbetter: Objected to as incompetent.

By the Court: Overruled.

Mr. Ledbetter: The plaintiffs except.

A. At the request of Mr. Mullen of Ardmore.

Q. The plaintiff in this case?

A. Yes, sir.

Q. Did he make out a plat of these lands which you filed; which you filed, with the application?

A. I think not; I will not be positive; I think I made those out sitting at a desk at the Land Office window.

Mr. Ledbetter: Move to strike the answer out as incompetent, irrelevant and immaterial.

149 By the Court: Overruled.

Plaintiffs except.

Q. At that time in whose employe were you?

Mr. Ledbetter: Objected to as incompetent, irrelevant and immaterial.

By the Court: Overruled.

Plaintiffs except.

A. In the employe of Mullen and Mullen.

Q. The plaintiff in this case?

A. Yes sir.

Q. What was your business in connection with your employment with Mr. Mullen?

Mr. Ledbetter: Objected to as incompetent, irrelevant and immaterial.

By the Court: Overruled.

Plaintiffs except.

A. He was in the real estate business or in the business of purchasing lands and leases from Indians and I was employed as a field man in that capacity.

Q. Your business was to procure leases and to buy lands?

A. Yes sir.

Q. And secure contracts with Indians?

A. Anything pertaining to that kind of business.

Q. For Mr. Mullen?

A. Yes sir.

Q. The plaintiff in this case?

A. Yes sir.

Q. Who made the request that you be appointed administrator of this estate.

Mr. Ledbetter: Objected to as incompetent, irrelevant and immaterial, and not the best evidence.

150 Overruled by the Court.
Plaintiffs except.

A. I believe that I filed a written request, as I remember it now I did, got waivers from the next of kin of the deceased, possibly only some of them, from some of them at least.

Q. Did you secure the waivers in person from the heirs of the deceased?

A. Yes, sir.

Q. Did you talk with them personally?

A. Yes, sir.

Q. Where did you see them?

A. At their homes or in the neighborhood there.

Q. At that time where was their home?

A. Their homes were in the southeast corner of the Choctaw Nation, near the town of Idabel.

Q. You went to see them in person?

A. Yes, sir; I believe one of them was not there at that time, but I think I saw two of them there, the widow and one of the brothers.

Q. And you procured waivers from them?

A. Yes, sir; that is my recollection now.

Q. At whose instance and request did you go to see them to procure these waivers?

A. Mr. Mullen's.

Q. The plaintiff in this case?

A. Yes, sir.

Q. Were you present when these deeds were made?

A. I was when some of them were made.

Q. Were you present when the deed was made from the Gardner heirs to Mr. Mullen on January 6th, 1906

151 A. I was present when the deed was made about that time; I am not positive as to this particular deed, but I think I was.

Q. Where was that?

A. Some of them; I think one or two of them were down in that country and one was at Boswell, as I remember it now.

Q. Who was the Notary Public that took the acknowledgments to this deed of January 6th, 1906.

A. I was.

Q. For whom were you acting when you took those deeds?

A. For Mr. Mullen.

Q. And at that time you were in his employe and acting for and in his behalf?

A. Yes, sir.

Q. And at the same time you were administrator of this estate.

A. Yes sir.

Q. At that time do you know whether these Indians could read the English language?

A. I don't know.

Q. Do you know whether they read the deeds?

A. Well; they looked over them and consulted; there was an interpreter present as I remember, and they had the deeds read to them.

Q. Do you know whether the covenants in that deed wherein they obligate themselves to deed any lands that might be selected in lieu of the specific lands described in the deed, whether that was explained to them or not?

A. I cannot say at this time; I did know at the time.

152 Q. On December 28th, 1908, there appears in Exhibit "8," a copy of the request signed by you as Administrator of the estate of Wilkin Gardner, deceased, asking that the land indicated on the inclosed plats, and said lands being the lands described in the plaintiffs' petition and situated in Stephens County, Oklahoma, and in Carter County, Oklahoma, asking that the Commissioner to the Five Civilized Tribes allot those lands in lieu of those lands in the contest; at that time were you administrator or acting in the capacity of administrator of that estate?

Mr. Ledbetter: Objected to as incompetent, irrelevant and immaterial.

By the Court: Overruled.

Plaintiffs except.

A. I thought I was at that time; I understand now that I was not.
Q. You had been discharged?
A. I think so.
Q. Prior to that time?
A. Yes, sir.
Q. At that time in 1908 when you made this request were you acting in behalf of the plaintiff J. S. Mullen, in this case?
A. I don't remember about making that request, but if I made the request I made it for him.

Mr. Martin: That's all.

Cross examination of the witness.

By Mr. Ledbetter, attorney for the plaintiffs:

Q. In what capacity were you working with Mr. Mullen?
A. Hired by the month.
153 Q. Did you have any interest in his business.
A. No, sir none whatever; other than as an employe.
Q. And looking after the interest of his business?
A. Yes, that's all.
Q. When you went and got the deeds from these Indians who was with you?
A. Frank Bonner.
Q. Where is he?
A. Dead.
Q. Do you remember the person you had as interpreter?
A. No sir; I was looking over some of the exhibits and I see something that impresses me at this time was along, Wash Thompson; I have used him so many times I cannot say whether he was along or not.
Q. Was it your custom to have an interpreter to explain the contents of deeds to Indians?
A. Yes, sir; I never took a deed in my life without having an interpreter or some one to explain the contents.
Q. You took the acknowledgments to the deeds?

A. Yes, sir; I see they were executed and that I took their acknowledgments at that time.

Q. You were sent down there by Mr. Mullen?

A. Yes, sir.

Q. You were a Notary Public of the *cne*tral district?

A. Yes, sir.

Q. You had had no interest in this land?

A. No, sir.

Q. And hav-n't any interest in this case?

A. No, sir.

154 Q. You say these deeds were explained to the Indians by the Interpreter?

A. All that I have any recollection of is that an interpreter was along, and it is just a general recollection of mine that it was.

Q. Did you take other acknowledgments in the Southern District of the Indian Territory, as Notary Public.

A. Yes, sir.

Q. What was your custom?

A. When I had them executed and acknowledged before me and the interpreter was there, I would have paid casual attention to it.

Q. Do you remember Frank Bonner going down there with you?

A. Yes, sir.

Q. Who was Frank Bonner acting for?

A. I don't know; I guess *to* I could say we acting in conjunction, through Mr. Mullen, I think he was.

Q. Did Mr. Bonner prevent these Indians getting the deeds explained to them?

A. No, sir.

Q. Explain to the Court what kind of an Indian Wilson Gardner was with reference to being educated?

A. He has a fairly good Academy education.

Q. What is that?

A. There is a school for orphan boys, Indian School, it corresponds to our Grammar Schools.

Q. Could he read and write?

A. Yes, sir.

Q. And no one prevented him reading this deed, or any of them?

A. No, sir.

155 Q. You took his acknowledgment?

A. Yes, sir.

Q. He saw it?

A. Yes, sir; he was sitting at the table with paper in front of him.

Q. What kind of an Indian is Anderson Gardner?

A. He can write his name; I think he can read a little bit.

Q. Did any one prevent him reading the deed?

A. No sir, so far as I know.

Q. And it was your custom as Notary Public to see that the instrument was read to them?

A. No, sir; I said that when the signature was written in my presence I saw *they* they understood it.

Q. Would you say that Mr. Mullen or Mrs. Mitchell prevented these Indians who signed the original deeds, from reading the same?
A. Not to my knowledge.
Q. Was J. W. Mullen down there at that time?
A. No, sir.
Q. Was L. V. Mullen down there at that time?
A. No, sir.
Q. Was there any other representative of J. S. Mullen or L. V. Mullen there at that time?
A. Think not.
Q. Do you know who got Wash Thompson there?
A. No, sir; I don't remember that he was there until I recalled some little incidents that occurred?
Q. Will you say he was there?
A. I remember distinctly of his being on one trip with Frank Bonner and me, and I believe he was on this trip.
156 Q. You say you had used him on many occasions as interpreter?
A. Yes, sir.
Q. How as he looked on by the members of the tribe for honesty and fairness?
A. He makes it a business as interpreter and he is a good interpreter but I don't know how a man who does not talk English looks on him.
Q. In every instance where you use him as an interpreter; state if in every instance he explains the instrument to them and goes over it with them?

Mr. Martin: Objected to as incompetent, irrelevant and immaterial and not tending to prove or disprove any of the issues in this case.

Sustained by the court.
Plaintiffs except.

Q. You say Anderson Gardner writes his own name?
A. Yes, sir.
Q. How about Nancy Gardner, does she speak English?
A. No, sir.
Q. Do you remember how you took her acknowledgment?
A. I hav-n't any vivid recollection of it and I hav-n't of Anderson's either.
Q. You say that where they sign in your presence you are satisfied with it?
A. Yes sir.

That's all.

Redirect examination.

By Mr. Martin, attorney for the defendants:

Q. After you went to Ardmore for the purpose of making these selections, do you know whether Wilson Gardner and Ander-

157 son Gardner were ever informed that such a selection had been made for them?

Mr. Ledbetter: Objected to as incompetent, irrelevant and immaterial.

Overruled by the Court.
Plaintiffs excepts.

A. I don't know; they knew in later years that I had selected the lands but I don't know when they learned it.

Q. Isn't it a fact that at the time you went down there and took these deeds it was represented to the Indians at that time by you that the lands described in the deed had been selected as the allotment of Wilkin Gardner?

A. That I represented to Wilson Gardner that I had selected these lands; I might have; I have no recollection of it.

Q. Isn't it a fact that at the time these Indians executed these deeds they executed it under the belief from the statements you made to them and the other parties there acting for Mr. Mullen, that the allotments had actually been selected and they were actually conveying the land described in the deeds at that time?

A. I believe they certainly believed that.

Mr. Ledbetter: Move to strike the answer out.
By the Court: Sustained.

Q. Was anything said to the Indians at the time of the execution of the deeds on the 6th day of January, 1906; that if it were decided these lands were not theirs that other lands would be selected for them by you?

A. I don't know.

Q. You did not hear anything like that mentioned?

A. No, sir.

Q. You heard all of the conversation at the time the deeds
158 were executed?

A. No, sir.

Q. Where were you?

A. Around there close.

Q. You saw the Indians execute the instruments and took their acknowledgments?

A. Yes, sir.

Q. You did not hear any such statements made at that time that in case this land was lost other lands would be selected?

A. No, sir.

Q. And you did not hear the deeds read?

A. No, sir.

Q. You state Wash Thompson was considered a good interpreter in that country?

A. I considered him a good interpreter.

Q. He was considered a good interpreter by the white men who bought land?

A. I considered him so.

Q. Isn't it a fact you talk Choctaw yourself fairly well?
A. I do not talk it; I understand a good deal of it.
Q. And at the time of the execution of these deeds Wash Thomson was a regular interpreter in the employe of Mr. Mullen?
A. I don't know whether he was or not.
Q. He was working for him at that time?
A. I don't know.

Taht's all.

Witness is excused.

159 Mr. Martin: The defendants now desire to offer in evidence Defendant's Exhibit "A," affidavits of Howard McBride in the matter of the selection of the allotments for Wilkin Gardner, deceased.

The same being in words and figures as follows, towit:

Exhibit "A," Defendants'.

160 "EXHIBIT A," DEFENDANTS'.

Department of the Interior,

Commissioner to the Five Civilized Tribes.

In the Matter of the Allotment of the Lands of the Choctaws and Chickasaws.

Citizens by Blood and Intermarriage.

Chickasaw Nation.

Ardmore, Indian Territory,

Jan. 3, 1906.

Testimony of Howard McBride in the Matter of the Allotment of the Lands of the Choctaws and Chickasaws to Wilkin Gardner, Deed.

HOWARD MCBRIDE being first duly sworn, testified as follows:

Q. What is your name?
A. Howard McBride.
Q. What is your post office address?
A. Lehigh, I. T.
Q. For whom are you making this application?
A. Wilkin Gardner, Deed.
Q. Was the person for whom this application is made living on September 25th, 1902?
A. Yes.

Q. Is he now living?
A. No.
Q. Has the person for whom this application is made received or applied for an allotment of land in the Creek, Cherokee, or Seminole Nation?
A. No.
Q. How do you represent this person?
A. As administrator.

Appraised value of lands allotted regular:

Jan. 3, 1906, ...	97.50	Contest Ardmore.
	909.36	
	1006.86	

Application is made for the following described land: Homestead; Choctaw B. B.

Application is made for the following described land exclusive of the homestead designated: S. E. ¼ N. W. ¼ S. W. ¼ Sec. 8, Town 5 S. Range 7 E. 10 acres, appraised value 32.50.

Total appraised value 32.50.

Cancelled by Decision in Chick. Contest No. 2932.

Q. Have you been upon these lands and examined them with a view to make this selection?
A. Yes.
Q. Are you fully informed as to the location of the same and the character of the soil?
A. Yes. Chickasaw allotment contest No. 2932.

"Exhibit A"—Defts.'

161 —. Are there any improvements on these lands?
A. Yes.
Q. What do the improvements consist of?
A. All fenced and in cultivation.
Q. Who is the owner of these improvements?
A. I am.
Q. Have you obtained permission of —— to select the land on which — improvements are located?
A. ——.
Q. Does any one else claim these lands or any part of them?
A. It is filed on by Frances Emma Moore, Deed.
Q. Are there any tribal schools, churches, court houses, jails, or other public tribal buildings located on these lands?
A. No.
Q. Is that portion of the land which you have designated as a homestead suitable for a home.
A. ——.
Q. Do you in behalf of Wilkin Gardner, Deed. accept the above

described land in allotment of the lands of the Choctaws and Chickasaws?

A. Yes.

HOWARD McBRIDE.

Witnesses to mark:

____ ____.

____ ____.

INDIAN TERRITORY,
Southern District:

I, the undersigned, a notary public in and for said district, do certify that the foregoing statements of Howard McBride were reduced to writing in his presence and were read to and subscribed by him in my presence at the time and place and in the matter mentioned in the caption, he having been first sworn by me that the testimony he should give in the matter should be the truth, the whole truth and nothing but the truth.

Given under my hand and official seal this 3rd day of Janv. 1906.

[SEAL.] J. H. CARLOCK,
Notary Public."

"Exhibit A" contd.

162 "Department of the Interior,

Commissioner to the Five Civilized Tribes.

In the Matter of the Allotment of the Lands of the Choctaw and Chickasaws.

Citizens by Blood and Intermarriage.

Chickasaw Nation.

Ardmore, Indian Territory,

Jan. 3, 1906.

Testimony of Howard McBride, in the Matter of the Allotment of the Lands of the Choctaws and Chickasaws, to Wilkin Gardner, Decd.

HOWARD MCBRIDE being first duly sworn, testifies as follows.

Q. What is your name?
A. Howard McBride.
Q. What is your post office address?
A. Lehigh, I. T.
Q. For whom are you making this application?
A. Wilkin Gardner, decd.

Q. Was the person for whom this application is made living on September 25th, 1902?
A. Yes.
Q. Is he now living?
A. No.
Q. Has the person for whom you make this application received or applied for an allotment of land in the Creek, Cherokee or Seminole Nation?
A. No.
Q. How do you represent this person?
A. Administrator.

Appraised value of lands allotted Jan. 3, 1906, $941.86. Contest, Ardmore.
Application is made for the following described Land:

Homestead: Roll, Choctaw B. B. No. 3710.

Application is made for the following described land exclusive of the homestead designated: N. W. ¼ S. W. ¼ S. E. ¼ Sec. 3, Town 5 S. Range 2 E. 10 acres. Appraised value $32.50. Certificate No. 20885.
N. E. ¼ N. W. ¼ S. W. ¼ Sec. 8, Town. 5 S. Range 7 E. 10 acres, appraised value $32.50, certificate No. 20886.
S. W. ¼ N. E. ¼ S. E. ¼ Sec. 34, Town 4 S. Range 2 E. 10 acres, appraised value $32.50, certificate No. 20887.
Total appraised value 77.50.

Q. Have you been upon these lands and examined them with a view to making this selection?
A. Yes.
Q. Are you fully informed as to the location of the same?
A. Yes.
Q. Are you fully informed as to the location of the same and the character of the soil?
A. Yes.

"Exhibit A," Dft.'s contd.
5-191.

163 Q. Are there any improvements on these lands?
A. Yes.
Q. What do the improvements consist of?
A. 10 acres in Sec. 34 T. 4 S. R. 2 E. fenced & in cultivation.
Q. Who is the owner of these improvements?
A. I am.
Q. Have you obtained permission of —— —— to select the land on — *this* improvements are located?
A. ——.
Q. Does any one else claim these lands or any part of them?
A. No.
Q. Are there any tribal schools, churches, court houses, jails, or other tribal public buildings located on these lands?

A. No.
Q. Is that portion of the land which you have designated as a homestead suitable for a home?
A. ——.
Q. Do you in behalf of Wilkin Gardner accept the above described land in allotment of the lands of the Choctaw and Chickasaws?
A. Yes.

HOWARD McBRIDE.

Witnesses to mark:
—— ——.
—— ——.

INDIAN TERRITORY,
Southern District:

I, the undersigned, a notary public in and for said district, do certify that the foregoing statements of Howard McBride were reduced to writing in his presence and were read to and subscribed by him in my presence at the time and place and in the manner mentioned in the caption, he having been first sworn by me that the testimony he should give in the matter should be the truth, the whole truth and nothing but the truth.

Given under my hand and official seal this 3rd day of Jany., 1906.
[SEAL.] J. H. CARLOCK,
Notary Public.

164 Department of the Interior,

Commissioner to the Five Civilized Tribes.

In the Matter of the Allotment of the Lands of the Choctaws and Chickasaws.

Citizens by Blood and Intermarriage.

Chickasaw Nation.

"EX. A," DEFTS.'—Contd.

Ardmore, Indian Territory,
Jan. 3, 1906.

Testimony of Howard McBride, in the Matter of the Allotment of the Lands of the Choctaws and Chickasaws, to Wilkin Gardner, Decd.

HOWARD McBRIDE being first duly sworn, testifies as follows:

Q. What is your name?
A. Howard McBride.
Q. What is your post office address?

A. Lehigh, I. T.
Q. For whom are you making this application?
A. Wilken Gardner, decd.
Q. Was the person for whom this application is made living on September 25th, 1902?
A. Yes.
Q. Is he now living?
A. No.
Q. Has the person for whom you make this application received or applied for an allotment of land in the Creek, Cherokee, or Seminole Nation?
A. No.
Q. How do you represent this person?
A. As Administrator.

Appraised value of lands allotted:

Regular	97.50	
Contest	849.36	Ardmore
	946.86	

Application is made for the following described land:

Homestead: Roll, Choctaw B. B. No. 3710.

Application is made for the following described land exclusive of the homestead designated:
N. W. ¼ N. W. ¼ S. E. ¼ Sec. 6, Town. 3 S. Range 1 E. Acres 10. Appraised value 32.50.
N. E. ¼ N. E. ¼ S. W. ¼ Sec. 6, Town. 3 S. Range 1. E. 10 Acres. Appraised value 60.00.
Total appraised value $92.50.

Cancelled by decision in Chick. Contest No. 2934.

Q. Have you been upon these lands and examined them with a view of making this selection?
A. Yes.
Q. Are you fully informed as to the location of the same and the character of the soil?
A. Yes.

"Ex. A," contd.
Chickasaw Allotment Contest No. 2934.

165 Q. Are there any improvements on these lands?
A. Yes.
Q. What do the improvements consist of?
A. House & Lot.
Q. Who is the owner of these improvements?
A. I am.
Q. Have you obtained permission of —— —— to select the land of which the improvements are located?
A. ——.

Q. Does any one else claim these lands or any part of them?
A. It is filed by Maud S. Cooper.
Q. Are there any tribal schools, churches, court houses, jails, or other tribal public buildings located on these lands?
A. No.
Q. Is that portion of the land which you have designated as a homestead suitable for a home?
A. Yes.
Q. Do you in behalf of Wilkin Gardner accept the above described lands in allotment of the Choctaws and Chickasaws?
A. Yes sir.

HOWARD McBRIDE.

Witness to mark:
—— ——.

INDIAN TERRITORY,
Southern District:

I, the undersigned, a Notary Public in and for said district, do certify that the foregoing statements of Howard McBride were reduced to writing in his presence and were read to and subscribed by him in my presence at the time and place and in the matter mentioned in the caption, he having been first sworn by me that the testimony he should give in the matter should be the truth, the whole truth and nothing but the truth.

Given under my hand and official seal this 3rd day of Janv., 1906.
[SEAL.] J. H. CARLOCK,
Notary Public.

166 Department of the Interior,

Commissioner to the Five Civilized Tribes.

In the Matter of the Allotment of the Lands of the Choctaws and Chickasaws.

Citizens by Blood and Intermarriage.

Chickasaw Nation.

"EXHIBIT A," DEFTS.'—Continued.

Ardmore, Indian Territory,
Jan. 3, 1906.

Testimony of Howard McBride, in the Matter of the Allotment of the Lands of the Chickasaw and Choctaws, to Wilkin Gardner, Decd.

HOWARD McBRIDE, being first duly sworn, testified as follows:

Q. What is your name?
A. Howard McBride.

Q. What is your post office address?
A. Lehigh, I. T.
Q. For whom are you making this application?
A. Wilkin Gardner, deed.
Q. Was the person for whom this application is made living on September 25, 1902?
A. Yes.
Q. Is he now living?
A. No.
Q. Has the person for whom you make this application ever received or applied for an allotment of land in the Creek, Cherokee or Seminole Nation?
A. No.
Q. How do you represent this person?
A. As Administrator.

Appraised value of lands allotted, Jan. 3, 1906:

Regular	97.50	
Contest	820.00	Ardmore.
	917.50	

Application is made for the following described land:

Homestead: Roll, Choctaw B. B. No. 2710.

Application is made for the following described land exclusive of the homestead designated:
E. 20.31 A. Lot #2, Sec. 6, Town. 3 S. Range 1 E. 20.31 acres. Appraised value 121.86.
Total appraised value 121.86.

Cancelled by decision in Chick. Contest No. 2933.

Q. Have you been upon these lands and examined them with a view to making this selection?
A. Yes.
Q. Are you fully informed as to the location of the same and the character of the soil?
A. Yes.

"Dfts.' Ex. A," contd.
Chickasaw allotment Contest No. 2933.

167 Q. Are there any improvements on these lands?
A. No.
Q. What do the improvements consist of?
A. ——.
Q. Who is the owner of these improvements?
A. ——.

Q. Have you obtained permission of —— to select the land on *this* —— improvements are located?

A. ——.

Q. Does any one else claim these lands or any part of them?

A. It is filed on by Willis Vera Cooper.

Q. Are there any tribal schools, churches, court houses, jails, or other tribal public buildings located on these lands?

A. No.

Q. Is that portion of the land which you have designated as a homestead suitable for a home?

A. ——.

Q. Do you in behalf of Wilkin Gardner accept the above described land in allotment of the lands of the Choctaws and Chickasaws?

A. Yes.

HOWARD McBRIDE.

Witness- to mark:

—— ——.

—— ——.

INDIAN TERRITORY,
Southern District:

I, the undersigned, a Notary Public in and for said district, do certify that the foregoing statements of Howard McBride were reduced to writing in his presence and were read to and subscribed by him in my presence at the time and place and in the matter mentioned in the caption, he having been first sworn by me that the testimony he should give in the matter should be the truth, the whole truth and nothing but the truth.

Given under my hand and official seal this 3rd day of Jany., 1906.

[SEAL.] J. H. CARLOCK,
Notary Public."

168 Department of the Interior.

Commissioner to the Five Civilized Tribes.

In the Matter of the Allotment of the Lands of the Choctaws and Chickasaws.

Citizens by Blood and Intermarriage.

Chickasaw Nation.

Ardmore, Indian Territory,
Jan. 3, 1906.

Testimony of Howard McBride in the Matter of the Allotment of the Lands of the Choctaws and Chickasaws to Wilkin Gardner, Deed.

HOWARD MCBRIDE, being first duly sworn, testifies as follows:

Q. What is your name?

A. Howard McBride.

Q. What is your post office address?
A. Lehigh, I. T.
Q. For whom are you making this application?
A. Wilkin Gardner, decd.
Q. Was the person for whom this application is made living on September 25th, 1902?
A. Yes.
Q. Is he now living?
A. No.
Q. Has the person for whom you make this application received or applied for an allotment of land in the Creek, Cherokee, or Seminole Nation?
A. No.
Q. How do you represent this Person?
A. As Administrator.

Appraised value of lands allotted regularly	$95.50
Contest Ardmore	246.85
	344.36

Application is made for the following described lands:
Homestead: Roll—Choctaw by Blood. No. 3710. Subdivision S. ½ N. E. ¼ Sec. 6, Town 3 S. Range 1 E. Acres 80. Appraised value 500.
Application is made for the following described land, exclusive of the homestead designated: N. E. ¼ S. E. ¼ Sec. 6, Town 3 S. Range 1 E. 40 Acres, appraised value 130; and N. ½ N. W. ¼ S. E. ¼ Sec. 6, Town 3 S. Range 1 E. 20 acres. Appraised value 65.
Total appraised value, 695.00.
Cancelled by decision Chick. Contest No. 2935.

Q. Have you been upon these lands and examined them with a view to making this selection?
A. Yes.
Q. Are you fully informed as to the location of the same and the character of the soil?
A. Yes.

"Exhibit A" defts. continued.

169 Q. Are there any improvements on these lands?
A. No.
Q. What do the improvements consist of?
A. ——.
Q. Who is the owner of the improvements?
A. ——.
Q. Have you obtained permission of —— to select the land on which —— improvements are located?
A. ——.
Q. Does any one else claim these lands or any part of them?

A. It is filed on by Henry Cooper.

Q. Are there any tribal schools, churches, court houses, jails, or other tribal public buildings located on these lands?

A. No.

Q. Is that portion of the land which you have designated as a homestead suitable for a home?

A. Yes.

Q. Do you in behalf of Wilken Gardner accept the above described land in allotment of the lands of the Choctaws and Chickasaws?

A. Yes.

HOWARD McBRIDE.

Witnesses to mark:

——— ———.

——— ———.

INDIAN TERRITORY,
Southern District:

I, the undersigned, a notary public in and for said district, do certify that the foregoing statements of Howard McBride were reduced to writing in his presence and were read to and subscribed by him in my presence at the time and place and in the matter mentioned in the caption, he having been first sworn by me that the testimony he should give in the matter should be the truth, the whole truth and nothing but the truth.

Given under my hand and seal this 3rd day of Jany., 1906.

[SEAL.] J. H. CARLOCK,
Notary Public."

170 Department of the Interior.

Commissioner to the Five Civilized Tribes.

In the Matter of the Allotment of the Lands of the Choctaws and Chickasaws.

Chickasaw Nation.

"Ex. A" Defts., continued.

Muskogee, Oklahoma, Sept. 9, 1910.

Whereas, the enrollment of Wilkin Gardner as a citizen by blood of the Choctaw Nation was approved by the Secretary of the Interior on the 12 day of December, 1902; and

Whereas, The Choctaw and Chickasaw Land Office of the Commissioner to the Five Civilized Tribes *have* been opened for the receipt of applications for allotments for a period of over one year to the date hereof; and

Whereas, the said Wilkin Gardner has not heretofore selected or

had selected for him an allotment of the lands of the Choctaw and Chickasaw Nations; and

Whereas, it was provided by the Act of Congress approved July 1, 1902 (32 Stats. 641), and ratified by the citizens of the Choctaw and Chickasaw Nations September 25, 1902, as follows:

"If any citizen or freedman of the Choctaw and Chickasaw Nations shall not have selected his al-otment within twelve months after the date of the opening of said land office in said nations, if not herein otherwise provided, and provided that twelve months shall have elapsed from the date of the approval of his enrollment by the Secretary of the Interior, then the Commission to the Five Civilized Tribes may immediately proceed to select an allotment, including a homestead for such person, said allotment and homestead to be selected as the Commission may deem for the best interest of said person, and the same shall be of the same force and effect as if such selection had been made by such citizen or freedman in person, and all lands held or claimed by persons for whom allotments have been

"Ex. A" contd.

171 selected by the Commission as provided, and in excess of the amount included in said allotments, shall be a part of the public domain of the Choctaw and Chickasaw Nations and be subject to disposition as such."

Now, therefore, the Commissioner to the Five Civilized Tribes, in accordance with the provisions of the Act of Congress approved July 1, 1902 (32 Stats. 641), above quoted, has this day selected as an allotment of the lands of the Choctaw and Chickasaw Nations including a homestead for the said Wilkin Gardner, the following described land:

Homestead.

Q. Roll, Choc. BB. No. 3710.

Subdivision Rx. 97.50.	Sec.	Town.	Range.	Acres.	Appraised value.	Certif. No.
S. 20.06 Ac. of Lot 3.....	7	1 N.	5 W.	20.06	100.30	
N. 20.06 Ac. of Lot 4.....	"	"	"	20.06	100.30	
S. ½ of N. E. ¼ of S. E. ¼...	12	1 N.	6 W.	20.	100.	
S. E. ¼ of S. E. ¼.....	"	"	"	40.	200.	19621

The following described land exclusive of the Homestead is allotted:

N. W. ¼ of S. E. ¼ of S. E. ¼	7	5 S.	2 E.	10	32.50	28266
S. E. ¼ of S. W. ¼ of N. W. ¼	25	1 S.	2 W.	10	15.	28267
S. E. ¼ of N. W. ¼ of N. E. ¼	23	8 S.	2 W.	10	32.50	
N. ½ of N. W. ¼ of S. W. ¼ of N. E. ¼.....	23	"	"	5	16.25	28267
N. 19.97 Ac. of Lot 1.....	4	3 N.	7 W.	19.97	99.85	
S. W. 10 Ac. of Lot 1.....	"	"	"	10	50.	
S. W. 10 Ac. of Lot 2.....	"	"	"	10	50.	
N. W. ¼ of S. W. ¼ of N. E. ¼	"	"	"	10	50	
S. E. ¼ of S. E. ¼ of N. E. ¼	"	"	"	10	50	28269
N. W. 8.36 Ac. of lot 17.....	10	4 N.	"	8.36	41.80	28270
Total appraised value.....					938.50	

COMMISSIONER TO THE FIVE CIVILIZED TRIBES.
J. GEO. WRIGHT.
D. H. B."

H." 24-127.

"Exhibit A," Defendants', continued.

172 Department of the Interior.

Commissioner to the Five Civilized Tribes.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disopsition of the lands of said tribes, and that the above and foregoing are true and correct copies of five applications and one arbitrayr filing for allotment of lands for Wilking Gardner, Choctaw by Blood, Roll No. 3710.

J. GEO. WRIGHT,
Commissioner to the Five Civilized Tribes."

Muskogee, Oklahoma, November 8, 1912.

C. D. D."

Defendants' Evidence, Continued.

By the Court: Call the next witness for the defendant.
Mr. Martin: Call Anderson Gardner.

173 ANDERSON GARDNER, being duly sworn, testified as follows:

Examination by Mr. Martin, attorney for the defendants:

Q. What is your name?
A. Anderson Gardner.
Q. You are one of the parties that is being sued by Mr. Mullen in regard to Wilkin Gardner's allotment?
A. Ugh huh.
Q. Do you know Howard McBride?
A. Yes, this man here.
Q. Do you remember signing the deed before McBride the first time in 1906?
A. Yes, January 6, 1906.
Q. Whose else signed those deeds; did Wilson Gardner sign it?
A. Yes.
Q. Did Nancy sign it?
A. Yes.
Q. Where were you when you signed them?
A. I don't know.
Q. Were you at Idabel; when you three people signed the deed to McBride, where were you, were you at Idabel or Culatuckalo?
A. At Culatuckalo.
Q. Who was there besides you and Wilson and Nancy, any one else there?
A. Yes, sir.
Q. Who were they; was McBride there?
A. Yes, and Wash Thompson.
Q. Was Wash Thompson there?
A. Yes, Wash Thompson there.
Q. Was Frank Bonner there?
A. Yes.
174 Q. Was he a white man?
A. Ugh huh, white man.
Q. You signed two deeds that day, did you not?
A. Yes, sir.
Q. Did you know at that time what you were signing?
A. I don't know.
Q. Did you know at the time you signed those two deeds that you were selling Wilkin Gardner's land?
A. I don't know.
Q. Can you read a newspaper?
A. Sometimes I read.
Q. Did you read those deeds over; did you pick them up and read them?
A. Yes, sometimes.

Q. Do you remember *seeking* those deeds when you signed them?
A. I remember signing them.
Q. Did you read them?
A. Yes.
Q. Did you read the deeds?

(No answer.)

By the Court: Gentlemen, I think we had better pass this hearing and get an interpreter for this witness.

Court at this time takes a recess until 8:30 A. M., April 18th, 1913. Proceeding at that time as follows, all parties being present in court as heretofore.

Jesse Altman, called and duly sworn as an Interpreter in said cause:

ANDERSON GARDNER, recalled, testified as follows, using Jesse Altman as interpreter.

Examination continued.

By Mr. Martin, attorney for the defendants:

175 Q. Are you the same Anderson Gardner that testified in this cause last evening?
A. Yes.
Q. At the time you signed the deed to Howard McBride who *you* present?
A. Wash Thompson.
Q. The interpreter?
A. Yes.
Q. Was Howard McBride present?
A. Yes, sir.
Q. Was the deed read to you?
A. No.
Q. Could you read English yourself at that time?
A. No, I could not read it.
Q. What was said to you at that time in regard to the deed?
A. Wash Thompson wanted me to sign it and I did.
Q. What else did Wash Thompson say, if anything?
A. He said Wilson and Nancy has done signed it and you must sign it; that's what the interpreter said; he thought his brother Wilson and Nancy had done signed it and he had to sign it.
Q. They said to you that Wilson and Nancy had done signed it?
A. Yes sir.
Q. Did they state to you what land they were selling?
A. No.
Q. Did you know at that time what land you were selling by signing that deed?
A. No.
Q. Did you learn afterwards what land it was and when?

A. Another Indian told him that he had sold this land of
176 Wilkin's about a month after he signed the deed.

Q. When did you learn relative to the time you signed the deed whose land it was that was described in the deed?

A. He don't know.

Q. When did you learn *those* land it was?

A. After he signed the deed he said he wondered whose land it was and in about a month he learned whose land it was.

Q. And they told you at the time you signed the deed that Wilson and Nancy had already signed the deed; is that right?

A. Wilson he was in Armstrong Academy then, and they said Wilson had already signed it.

Q. Had Wilson signed the deed at the time you signed this deed?

A. Wilson had not signed it then.

Q. When did Wilson sign the deed?

A. Wilson signed it afterwards.

Q. Would you have signed the deed at that time had you known that Wilson had not signed the deed?

Mr. Ledbetter: Objected to as incompetent, irrelevant and immaterial.

Overruled by the Court.

Plaintiff excepts.

By the Court: I understand all of this testimony is subject to the ruling on that particular paragraph in the petition?

Mr. Martin: Yes, sir.

Q. Would you have signed this deed to McBride on the 6th day of January, 1906, if you had known that Wilson Gardner had not signed the deed at that time?

177 A. He said Wilson has a better education than he has and if he had known that Wilson had not signed the deed he would not have signed it.

Q. Did you believe at the time you signed the deed that Wilson had signed it?

A. Yes; he believed that Wilson had signed the deed.

Q. And you got that belief from the statements Wash Thompson made at that time?

A. Yes.

Q. Was Wash Thompson your interpreter at that time or was he working for Howard McBride?

Mr. Ledbetter: Objected to as leading and suggestive.

Overruled by the court.

Plaintiff excepts.

A. He was working for the land buyer Howard McBride.

Q. Are you a full blood member of the Choctaw tribe of Indians?

Mr. Ledbetter: That is admitted in the pleadings, and the record and evidence in the case show it.

By the Court: Sustained.

Q. Are you a member of the Choctaw tribe of Indians?
A. Yes; I am a full blood Choctaw.

Mr. Ledbetter: Move to strike out that answer of the witness wherein he says he is a full blood Choctaw.
By the Court: Overruled. But it is not controlling as to the blood; let the answer remain as it is.

Q. Do you know whether Wilson Gardner is a member of the Choctaw Tribe of Indians,
A. Yes.
Q. How long have you known Wash Thompson?
A. About ten years.

178 That's all.

Cross-examination of the witness.

By Mr. Ledbetter, attorney for the plaintiffs:

Q. Where did Wash Thompson see you at the time you signed this deed?
A. At home.
Q. Where is that?
A. Eight miles from Brokenbow, I don't understand what he says his post office is.
Q. What day of the month did you sign that deed?
A. January 6, 1906.
Q. What date did Wilson sign it?
A. I don't know.
Q. You say if you had known that Wilson Gardner had signed the deed it would have been all right for you to have signed it?

Mr. Martin: Objected to as not the statement of the witness.

Overruled.
Defendants except.

A. Yes; if Wilson had signed it it would have been all right.
Q. And he afterwards did sign it?
A. Yes, he signed it afterwards; that's what I heard.
Q. What relation were you to Wilkin Gardner?
A. Brother.
Q. When Wilkin Gardner died you knew his land and estate went to you and your brother Wilson Gardner, did you not?
A. Yes sir.
Q. And if you were to die about where you- allotment would go?

Mr. Martin: Objected to as calling for a conclusion of the witness.

179 Sustained by the Court.

Q. When Wilkin Gardner died do you know whether he had made his selection of land or not?

Mr. Martin: Objected to as not the best evidence.
By the Court: He may answer the question if he knows.
Defendants except.

A. I don't know.
Q. When you signed the deed on January 6th, 1906, I believe you state that Wash Thompson told you that Wilson Gardner had already signed the deed?
A. I thought so.
Q. How did you get that information?
A. Wash Thompson told him.
Q. Was the deed already signed.
A. Wash Thompson said that it was signed; Wash Thompson advised him to sign it because Wilson Gardner had already signed it.
Q. Was the deed put before you to sign it?
A. Yes, it was put before him.
Q. And you signed it right here, didn't you; that's your name here?
A. Yes.
Q. That's your hand writing?
A. Yes, I signed that.
Q. You say you could not read at that time?
A. Very little, he said.
Q. Did you ask Wash Thompson to read it over to you?
A. No, Wash Thompson did not read it to me.
Q. Did you ask Wash Thompson to read it to you?
A. No, I did not ask him.
Q. Did you ask Wash Thompson to read it over to you?
A. No, I did not ask him.
180 Q. When was the first time you made any objection to this conveyance?
A. I made objections to it about October.
Q. 1912?
A. Yes, 1912.
Q. You knew you had signed the deed a month after January 1906 and you waited until October 1912 before you made any objections; is that correct?
A. Yes.
Q. Who came to you first in October 1921 to buy this land?
A. Charley Baker.
Q. A white man?
A. Yes, white man.
Q. Do you know who was connected with Charley Baker, if any one?
A. No, I don't know.
Q. What does Charley Baker do down ther-?
A. I don't know him at all.
Q. Didn't he used to live here in Duncan?
A. His home is in Idabel.
Q. He trades with Indians, don't he, buying lands?
A. He don't know.

—. What did Charley Baker say to you when he came to you to buy this land?

A. Yes, Charley Baker wants to buy this land from him if it came clear.

Q. This land over here?

A. Yes.

Q. And that is the reason you made the objections to the original deed?

181 A. Yes; that is why he objected.

Q. Do you remember the process of the court being served on you to prevent you selling this land to Charley Baker?

A. Yes.

Q. And you did not make any deal with Charley Baker then?

A. No.

Q. How much was Charley Baker going to pay you?

Mr. Brown: Objected to as immaterial and irrelevant.

Overruled by the court.

Defendants except.

A. He did not say.

Q. How much was he to pay you?

A. He did not give me anything.

Q. How much was he to give you?

A. $347.10.

Q. $347.10?

A. Yes.

Q. That was the amount that Charley Baker was to pay you, is it; how much was you to get from Baker?

A. He don't say.

Q. How much was Charley Baker to pay you for this land?

A. Six thousand dollars ($6000.).

Q. How much was Wilson Gardner to get?

A. Wilson is dead now, he says.

Q. How much was Wilson to get?

A. They were to make the deal and have one-half (½) interest.

Q. What do you mean by a deal; with whom?

A. Charley Baker.

182 Q. You signed a deed to Whiteman in February of this year, 1913?

A. He says he signed a deed to Whiteman but he does not know what it was?

Q. I will ask you when you signed the deed to Whiteman if you all did not talk about the injunction of the court?

A. Yes.

Q. Then you knew you were selling this land over here in Stephens County, didn't you?

A. I don't know.

Q. How much money did he give you, $4.50 wasn't it?

A. Yes, sir: $4.50, he got it out of his pocket and gave it to me.

Q. And you signed it?

A. Yes, I signed it.
Q. Did you have any one to read that deed over to you?
A. No.
Q. Did you ask any one to read it to you?
A. No.
Q. Did you ever go down to the Indian Agent and talk and advise with him about trading and trafficking in the land that you owned and that you inherited?
A. No, sir.
Q. Did you ever advise with Mr. Martin, your lawyer in this case as to whether you should sell or not?
A. No.
Q. And you got Mr. Martin to bring this suit for you; to represent you rather?
A. Yes.
Q. You signed up a contract with him to give him a certain
183 per cent if you win, didn't you?
A. They did not say what I was going to pay him.
Q. Didn't you sign up a written contract with Mr. Martin?
A. He said this Martin here get four *four* cents (4c.) out of the dollar.
Q. Is this your signature?
A. Yes, sir.
Q. Did you read this contract when you signed it?
A. No.
Q. Did you ask Mr. Martin to read it over to you?
A. Yes; and he read it over to me but I did not understand it.
Q. You went ahead and signed it just the same?
A. Yes.
Q. Do you know George F. Womack?
A. No, I don't live here.
Q. Do you know R. H. Brown?
A. Yes, I know him.
Q. Where did you know him?
A. In his office up here.
Q. How long have you known him?
A. Since yesterday.
Q. Did you employ him in this law suit in October 1912?
A. No; I did not employ him.
Q. I wish you would interpret this contract to the witness and ask him if he signed it?
A. Yes; he said he made this contract.
Q. You say you did not know Mr. Brown and Mr. Womack in October, 1912?

Mr. Brown: Objected to as incompetent, irrelevant and immaterial.
184 By the Court: I don't see where this is material any further.

Q. When did you come over here?
A. Last Tuesday night.

Q. Who did you come with?
A. R. C. Martin.
Q. Who paid your railroad fare over here?

Mr. Martin: Objected to as incompetent, irrelevant and immaterial.

Overruled by the Court.

Defendants except.

A. R. C. Martin paid his railroad fare.
Q. Who paid your hotel bills?
A. I paid that myself.
Q. Is Mr. Martin to pay that back to you?
A. No.
Q. Going back to January the 6th, 1906, when you signed that deed to Howard McBride, before Howard McBride as notary public, did you receive any money at that time?
A. He said he received $347.10.
Q. How was that money paid to you?
A. Gave him a check, he said.
Q. Do you remember on what bank that check was drawn?
A. Now, he don't know.
Q. Nancy Gardner, Wilson Gardner and Anderson Gardner were the three parties who signed the original deed?
A. Yes.
Q. Do you know how much money they got?
A. Yes.
Q. How much?
A. $347.10.
185 Q. You each got $347.10?
A. Yes.
Q. Then all three of you got $1041.30?
A. Yes, sir.

Mr. Martin: At this time we ask that the reply of the witness in which he said he was to receive $347.10 from Charles Baker be stricken out.

By the Court: Overruled; you may ask him to explain the statement.

Redirect examination of the witness.

By Mr. Martin, attorney for the defendants:

Q. When you talked with Charley Baker last fall about his buying this land, this Wilking Gardner allotment; how much money was he to pay you if he got the land?
A. Charley Baker was to pay me Six Thousand Dollars.
Q. Charley Baker did not say anything to you about $347.10?
A. No.
Q. When was it that you first learned that the plaintiff in this case, Mr. Mullen, claimed to own the Wilkin Gardner allotment?

Mr. Ledbetter: Objected to as incompetent, irrelevant and immaterial.

Over-uled by the Court.
Plaintiffs except.

Mr. Ledbetter: Objected to for the further reason that the witness has stated that he did not know what had become of the Wilkin Gardner estate and did not know anything about it.

Overruled by the court.
186 Plaintiffs except.

A. He said he did not know.
Q. When did you first learn that you had signed a deed purporting to convey the Wilking Gardner allotment?
A. He said he did not know.
Q. Do you know it now?
A. Yes; he says he knows it now.
Q. Isn't it a fact to refresh your memory, that Charles Baker, in the faill of 1912 told you that you had already signed a deed to the Wilkin Gardner allotment and that that was the first time that you knew about it?

Mr. Ledbetter: Objected to as leading and suggestive.

Overruled by the court.
Plaintiff excepts.

A. Yes, that was the first time.
Q. And that was the Mullen deed that Baker was talking about?
A. Yes; that was the deed.
Q. In regard to this contract that you signed with Mr. Martin; isn't it a fact that Wilson Gardner and you came to my office and employed me in this case?
A. Yes.
Q. And isn't it a fact that after I wrote the contract I asked you to take it to the Indian Agent and have him read it to you before you signed it?
A. Yes.
A. *Yes.*
Q. And Davis Jeames was the interpreter for the Indian Agent at that time, was he not?
A. Yes.

That's all .

187 Recross-examination of the witness Anderson Gardner.

By Mr. Ledbetter, attorney for the plaintiffs:

Q. When you got that $347.10 on January 6th, 1906, what did you think you were getting that money for?
A. He said he was going to pay the debts that he owed.

Mr. Ledbetter: Move to strike the answer out as not responsive.

Sustained by the court.

A. Thinks he was selling the Wilkin Gardner allotment.
Q. You got that money for signing your name to this deed?
A. Yes. He says he thinks he was selling it when he signed the deed.
Q. And that's what you got the money for, wasn't it?
A. Yes.
Q. And you say that about a month after that some Choctaw told you you had sold your brother's allotment; what Choctaw was that?
A. Abner Clay told me.
Q. Abner Clay is dead now, isn't he?
A. Yes.

That's all.

Redirect examination.

By Mr. Martin, attorney for the defendants:

Q. Did any one talk with you about selecting any lands for Wilkin Gardner, after he died?
A. No.
Q. Did you ever talk with Howard McBride or any other person about land to be selected for Wilkin Gardner before you signed this deed of January 6th, 1906?

188 Mr. Ledbetter: Objected to as incompetent, irrelevant and immaterial and seeking to impeach his own witness Howard McBride.
By the Court: Let him answer it.

A. Yes.
Q. Ask him the question again. (Question is repeated to the witness.)
A. He says yes.
Q. Have you ever been in possession of the land that was selected for Wilkin Gardner, or any part of it?

Mr. Ledbetter: Objected to as incompetent, irrelevant and immaterial.

Sustained by the Court.

Q. Have you ever at any time lived on this land that was selected for the allotment of Wilkin Gardner, or did you ever have any one else living on it for you?
A. No.

That's all.

Witness excused.

Admission of Counsel.

Mr. Martin: It is admitted by the Plaintiff that the land described on the last page of Exhibit "A" for the defendand- which purports to be an arbitrary filing by the Commissioner to the Five Civilized Tribes, and which lands are the lands involved in this suit, were, on the 6th day of January, 1906, and from that time until the
189 9th day of September, 1910, tribal lands of the Choctaw and Chickasaw Tribe of Indians and were until the said 9th day of September, 1910, under the control and management of the Interior Department for the purpose of selection or allotment to the members of the Tribes. You admit that do you Mr. Ledbetter?

Mr. Ledbetter: Yes.

Mr. Martin: Will you further admit that Wilson Gardner and Anderson Gardner and Nancy Gardner, the defendants, are duly enrolled full blood members of the Choctaw Tribe of Indians?

Mr. Ledbetter: Yes, and that the parties in whose name this cause is revived since the death of Wilson Gardner are also full blood Choctaw Indians?

Mr. Martin: I admit that.

Mr. Ledbetter: You speak of these lands being arbitrarily allotted in the agreement; unless you agree to it I have Mr. Rodgers here and can make this proof by him.

Mr. Ledbetter: I will be sworn, if the court please.

H. A. LEDBETTER, being duly sworn, testified as follows:

My name is H. A. Ledbetter; after the closing of the Chickasaw Land Office in 1908 which was located at Ardmore, all allotments were made at the General Office at Muskogee; the practice in making ing allotments at that time, those plats being attached to the statement gesting certain lands to be filed upon in the name of a certain party for whom the allotment was to be made. I have been in the
190 practice before the Departments since 1896 or 1897 or 1898 and that since that time I have been continuously engaged in the practice; and Plaintiffs' Exhibit "8" which shows certain plats attached to the certificate of the Commission was the practice in making allotmetns at that time, those plats being attached to the statement of Howard McBride representing himself to be the administrator, forwarded to the Land Office the plats attached to Plaintiffs' Exhibit "8", and that the lands in controversy under this practice were allotted to and in the name of Wilkin Gardner, deceased, as suggested by Howard McBride, administrator.

Cross-examination of the witness.

By Mr. Martin, attorney for the defendants:

Q. You say you are familiar with the practice of selecting land at the office at Muskogee after the closing of the land office at Ardmore?

A. Yes, sir.

Q. I call your attention to the last page of Exhibit "A" which is signed by J. Geo. Wright, Commissioner to the Five Civilized Tribes, dated the 9th day of May, 1910, at Muskogee, purporting to be a selection of land; why was that land selected.

A. Because there had been land lost in contests that the administrator sought to have filed upon in January, 1906, and on suggestion of the administrator the Commissioner made the allotment of the land and being the same land involved in this law suit.

191 Q. Under what authority did the Commissioner make that selection?

A. Under the Treaty of 1902.

Q. Will you read the clause to the court there giving him authority to make that selection and the manner in which he did it?

A. "If any citizen or freedman of the Choctaw and Chickasaw Nations shall not have selected his allotment within twelve months after the date of the opening of said land office in said nations, if not herein otherwise provided, and provided that twelve months shall have elapsed from the date of the approval of his enrollment by the Secretary of the Interior, then the Commissioner to the Five Civilized Tribes may immediately proceed to select and allot, including a homestead for such person, said allotment and homestead to be selected as the Commissioner may deem for the best interest of said person, and all lands held or claimed by persons for whom allotments have been selected by the Commissioner as provided, and in excess of the amount included in said allotments, shall be a part of the public domain of the Choctaw and Chickasaw Nations, and be subject to disposition as such."

Q. If Howard McBride had not made selection or suggestion at this time or prior to this time for allotment, would it have been the duty of the Commissioner to go ahead and make that selection any way?

A. They could have done it; he had had twelve months after announcement that arbitrary allotments could be made.

192 Q. Wasn't it the duty of the Commissioner to make that selection under the clause of the Act of Congress you have read; it was his duty imposed upon him by law?

A. Yes, sir; but it was optional that he had to make a selection.

Q. Will you state to the Court whether that is an arbitrary selection there?

A. I would say that it is not an arbitrary selection, but a selection under the direction of the administrator of the estate of the deceased Indian.

Q. What is an arbitrary allotment?

A. One made by the Dawes Commission without suggestion from any one as to what lands to be selected; this was selected by Howard McBride, administrator.

Q. Does the Commissioner say anything about the selection in the original selection?

A. I have not read it.

Q. Please read it and see?

A. It makes no mention of the selection but the selection is a part of the exhibit.

Q. Don't you know as a lawyer, pretty well acquainted with the manner of selecting lands for these people; that that is purely and simply an arbitrary allotment, selection?

A. No, sir; I say it was not an arbitrary allotment under my construction of it.

That's all.

Witness is excused.

193 GEO. D. RODGERS, being duly sworn as a witness, testified as follows:

Examination.

By Mr. Martin, attorney for the defendants:

Q. State your name to the Court?

A. George D. Rodgers.

Q. Where do you live?

A. Muskogee.

Q. What is your business?

A. Attorney at Law.

Q. Were you since 1893, since the formation of the Dawes Commission, ever in the employe of the Interior department and in the employe of that branch of the government assisted in the distribution of the Indian lands for the Five Civilized Tribes?

A. Yes, sir.

Q. At what time?

A. From May 1902 to July 1st, 1907, I was connected with the Commission to the Five Civilized Tribes.

Q. You were Chief Clerk for the Commissioner?

A. I was with the land office at Ardmore for a year when it first opened and then went to Muskogee and was Chief law Clerk for a year and was Chief Clerk to the Commissioner for about six months.

Q. When did your services cease as Chief Law Clerk?

A. In 1907.

Q. From your experience there are you familiar and well acquainted with the method adopted by the Commissioner to the Five Civilized Tribes in the selection and distribution of these Indian lands?

194 A. I think so.

Q. It is a fact you are considered as much informed as any man in the Indian Territory part of the State; you can say that without false modesty?

A. I don't know how I am considered; I have had a good deal of experience.

Q. I show you the defendants' "Exhibit A" which is dated at Muskogee and call your attention to the last page which is dated September 9, 1910, and is signed by J. Geo. Wright, Commissioner to the Five Civilized Tribes, or by his authority, purporting to select

certain lands for one Wilkin Gardner; examine the instrument and tell the court what it is?

A. That is, I presume, a copy of the preliminary record upon which application for selection of lands were made to the Commission; the first record of it.

Q. That is the first record of it?

A. Yes, sir.

Q. Kindly explain to the court just exactly what that means?

A. The Commission had two forms of application during the time I was connected with them and one was of the form as the form contained on the first page of this exhibit, and the other form is contained on the last page of the exhibit. The first page was used while the Land Office was in existence and my impression is they never had any other forms except these two; I am speaking of the procedure while the land office was in existence; when a party appeared in person or his guardian or administrator or father the selection was made on a form as of the first page of defendant's ex-
195 hibit "A" which is marked "Cancelled," and when no selection is made by the person himself or his representative it was made on a form as of the last page of the same exhibit by the Commission which was called an arbitrary filing.

Q. And was solely on the initiative of the Department; was it not; in other words that was the first step that was taken in selecting and in designating the land?

A. Yes, sir.

Q. It was the first step taken in segregating this particular land for the allottee of the tribal lands?

A. Yes, sir.

Q. And they did that by authority of the Act of Congress?

A. Yes, sir.

Q. And the last form in the exhibit there would indicate to you that up to September 9, 1910, the lands described therein were a part of the public Domain of the Choctaw and Chickasaw Nations and Tribes of Indians and that that was the first step to segregate that from the tribal lands?

A. Yes, sir.

That's all.

Cross-examination of the witness.

By Mr. Ledbetter, attorney for the plaintiffs:

Q. When did you leave the Commission?

A. July 1st, 1907.

Q. Do you know what the rules and practices have been since 1907 as to the Choctaw and Chickasaw Nations?

A. I have had considerable practice before the Commission and know the practice fairly well.

196 Q. Since 1908 when the land office closed at Ardmore have you been familiar with the practice as to how to allot land?

A. Yes, sir.

Q. If I were a Choctaw Indian and wanted to allot some land after the land office closed at Ardmore, how would I do it?

A. My impression is that after the land office closed at Ardmore the Commission to the Five Civilized Tribes would not receive any original applications from allottees or their representatives but they permitted the allottees or their representatives to indicate what land they might file in allotment and if the land appeared to be suitable and was subject to allotment he would make a so called arbitrary allotment or filing of land indicated by them.

Q. It was looked upon by the Commission as an arbitrary filing because the land office was closed?

A. That was possibly a name used to indicate the kind of a filing it was.

Q. You being familiar with the practice; Plaintiffs' "Exhibit 8" shows the land in this county and being the land in controversy, and attached to these is the affidavit of Howard McBride, as administrator suggesting that this land be filed upon; now if these lands were filed upon by Wilkin Gardner under the direction of the Commissioner would that be in your opinion an arbitrary allotment or would it be a selection made in the ordinary form prior to the closing of the land office?

A. The effect would be the same so far as the allottee is concerned he or his representative has designated the land
197 and he has filed on it; I think probably the contention of the Commissioner at that time was that while he would in every case as far as possible follow the wishes of the allottee or his representative, that he was not bound to take their designation; then the land office was open and the allottee made a selection of land, the land office had to receive that if it was in proper form; that man had done all he could to segregate that particular land for himself; but if the land office was closed it was a matter of following up the wishes if possible.

Q. And if the allottee or his representative appeared before the Commissioner it was imperative on the Commissioner at the land office to receive his application?

A. Yes, sir.

Q. And if the Commissioner refused the Commissioner gave the allottee or his representative the usual notice that he could not file on it because some one else had already filed on it or that it was segregated lands?

A. Yes, sir.

Q. What would be the steps of the allottee after those conditions arose?

A. To file a contest if he desired so to do.

That's all.

Witness is excused.

198 Mr. Martin: The Defendants rest.
Mr. Ledbetter: The Plaintiffs rest.

Evidence is closed.

The Court thereupon took said cause under advisement and counsel were directed to prepare and file their briefs of the law in said cause with the Court.

The foregoing being all of the evidence, both written and oral, offered in the trial of said cause.

199 In the District Court of Grady County, State of Oklahoma.

No. 1069.

L. V. MULLEN et al., Plaintiff-,

vs.

WILSON GARDNER et al., Defendants.

Certificate of Official Stenographer.

STATE OF OKLAHOMA,
County of Stephens, ss:

I, D. M. Cavaness, the duly qualified and acting court reporter for the above entitled court, hereby certify that the above and foregoing record contains a full, true, complete and correct record, transcript and copy of all the evidence, both written and oral, offered in the trial of said cause; all the statements of the court and of counsel, all of the Motions, Demurrers, objections and exceptions and all rulings of the court and exceptions thereto, and all other proceedings had in said trial and the same are true and correct and I do so certify.

Given under my hand as such official court reporter on this the 26th day of January, A. D. 1914.

D. M. CAVANESS,
District Court Reporter in and for Stephens County, Oklahoma.

Certificate of Stenographer.

200 And be it remembered that on the 4th day of November, 1913, at the regular November, 1913, term of the District Court of Stephens County, Oklahoma, in open court, the Court rendered Judgment in the above and foregoing cause in favor of the defendants. To which action of the court the plaintiffs at the time, in open court, duly excepted and exceptions allowed.

The Journal Entry of the Judgment made, entered and filed in said cause, which is recorded in Journal Number 3, at page Numbered 560 of the Journal of the District Court of said Stephens County, State of Oklahoma, is in words and figures as follows, towit:

Journal Entry of Judgment.

201 In the District Court for Stephens County, State of Oklahoma.

L. V. MULLEN and J. S. MULLEN, Plaintiffs,

vs.

NANCY GARDNER, WILSON GARDNER and ANDERSON GARDNER, Defendants.

Judgment and Journal Entry.

I.

Now on this the 4th day of November, 1913, the above entitled cause came on to be heard in its regular order, the plaintiffs being represented by their attorney, H. A. Ledbetter, and the defendants by their attorneys, R. C. Martin and Womack & Brown, and the court having heard the evidence and argument of counsel, and being fully advised in the premises, finds the issues in favor of the defendants and against the plaintiffs. The Court further finds that the following described tract of land, towit:

The South 20.06 acres of lot 3 of Sec. 7, Twp. 1 N. R. 5 W., & N. 20 and 06/100 acres of Lot 4 Sec. 7, Twp. 1 N. — 5 W., and S. ½ of N. E. ¼ of S. E. ¼ of Sec. 12, Twp. 1 N. R. 6 W., and S. E. ¼ of S. E. ¼ of Sec. 12, Twp. 1 N. R. 6 W., and N. W. ¼ of S. E. ¼ of S. E. ¼ of Sec. 7, Twp. 5 S. R. 2 E., and S. E. ¼ of S. W. ¼ of N. W. ¼ of Sec. 25, Twp. 1 S. R. 2 W., and S. E. ¼ of N. W. ¼ of N. E. ¼ of Sec. 23, Twp. 8 S. R. 2 W., and N. ½ of N. W. ¼ of S. W. ¼ of N. E. ¼ of Sec. 23, Twp. 8 S. R. 2 W., and North 19.97 acres of lot 1 of Sec. 4, Twp. 3 N. R. 7 W., and the S. W. 10 acres of Lot 1 of Sec. 4, Twp. 3 N. R. 7 W., and the N. W. ¼ of the N. W. ¼ of N. E. ¼ of Sec. 4, Twp. 3 N. R. 7 W., and S. E. ¼ of S. E. ¼ of N. E. ¼ of Sec. 4, Twp. 3 N. R. 7 W., and the S. W. 10 acres of Lot 2 of Sec. 4, Twp. 3 N. — 7 W., and the N. W. 8.36 acres of Lot 17, of Sec. 18, Twp. 4 N. R. 7 West.

202 II.

That said lands described above in paragraph one constitute a portion of the allotment of Wilkin Gardner, deceased, who was a citizen of the Choctaw Tribe of Indians and a duly enrolled full blood member of such Tribe and as a member of said tribe was entitled to have set apart and allotted to him three hundred and twenty (320) acres of the share of allot-able tribal lands of the Chickasaw-Choctaw Nations; and the Court finds that said Wilkin Gardner died intestate in what is now McCurtain County, Oklahoma, in the year 1905, leaving surviving him as his only heirs at law his two brothers, Wilson Gardner and Anderson Gardner; that he left surviving him his wife, Nancy Gardner, and Wilkin Gardner, deceased,

and Nancy Gardner had no issue and that the said Nancy Gardner is now dead.

III.

The court further finds that Wilson Gardner, the defendant herein and Anderson Gardner were duly enrolled full blood citizens of the Choctaw Tribe of Indians; and that the said Wilkin Gardner, deceased, died before the above described tract of land had been selected by him, and that subsequent to his death, his heirs, Wilson Gardner and Anderson Gardner were entitled to have selected and allotted in the name of the deceased, Wilkin Gardner, for their sole benefit said acreage and amount of land three hundred and twenty (320) acres from the Tribal lands of the Chickasaw-Choctaw Nations.

IV.

The court further finds that after the death of the said Wilkin Gardner, deceased, an allotment of land was attempted to be selected in his name and for the benefit of his heirs, and that this allotment of land was situated in what is now Carter County and Mar-
203 shall County, Oklahoma; and that on the 6th day of January, 1906, the said Wilson Gardner and Anderson Gardner and Nancy Gardner, defendants herein, executed their deed to J. S. Mullen and L. V. Mullen to a portion of said lands and on the same day executed their deed to Mrs. Mattie Mitchell, conveying such protion of the allotment of land attempted to be selected in Marshall and Carter Counties, Oklahoma, as was not attempted to be conveyed to J. S. Mullen and L. V. Mullen; that both of these deeds contained the following covenants, to-wit:

"And if for any reason the lands hereinbefore filed upon, selected and allotted to the said Wilkin Gardner, should be adjudged by any tribunal not to be the lands of the said Wilkin Gardner, then in that event the said Howard McBride or his successor shall select, file upon and allot other lands of equal appraised value of that described in and cover said land so selected, filed upon and allotted, and this conveyance shall extend to and convey all of said *lands so selected and filed upon and allotted, and that this conveyance shall extend to and convey all of said* land, and if for any reason it shall be necessary for another deed to be executed in order for a title in fee simple to pass to the said J. S. Mullen and L. V. Mullen, that in that event we do for ourselves, our heirs, executors and administrators represent and warrant unto J. S. Mullen and L. V. Mullen, their heirs and assigns, that we will execute such a deed conveying the same as aforesaid."

That a like covenant is contained in the deed from Mrs. Alice Mitchell. And the Court further finds that the lands attempted to be conveyed by the two deeds mentioned in this paragraph
204 were attempted to be selected and filed upon by Howard McBride, acting as the administrator of the estate of said Wilkin Gardner, deceased.

V.

The court further finds that the attempted selection by the said Howard McBride of the lands mentioned in the last preceeding paragraph was contested and cancelled except as to thirty (30) acres, which is particularly described as follows:

The N. W. ¼ of the S. W. ¼ of the S. E. ¼ of Section 3, township 5 south of Range 2, East; and the S. W. ¼ of the N. E. ¼ of the S. E. ¼ of Section 34, township 4 south of range 2 East, and the N. E. ¼ of the N. W. ¼ of the S. W. ¼ of Section 8, township 5 south of range 7 East.

VI.

The court further finds that the lands described in paragraph one herein were tribal lands of the Chickasaw-Choctaw Nations until the 9th day of September, 1910, when certificates of allotments were issues in the name of Wilkin Gardner. And the court finds that at the time of the execution of said deed on January 6th, 1906, to J. S. Mullen, L. V. Mullen and Mrs. Alice Mitchell, and until the 9th day of September, 1910, that said lands described in paragraph one hereof were tribal lands of the Chickasaw-Choctaw Nations and under the sole control of the Interior department of the federal government for the purpose of distribution among the members of the Chickasaw-Choctaw tribe of Indians under the laws, treaties, rules and regulations of Congress and the Department of the Interior.

—.

205 The court further finds that said two deeds executed by the defendants, Wilson Gardner and Anderson Gardner and Nancy Gardner on the 6th day of January, 1906, to J. S. Mullen and L. V. Mullen and Alice Mitchell, conveyed no interest in the lands above described in paragraph one herein, and that said quoted covenants contained in paragraph four herein, and, which was contained in each of said deeds was and is null and void, and that so far as the lands in paragraph one herein are concerned, the said quoted covenants in each of said two deeds contained were and are in conflict with the Federal Statutes, Treaties, rules and regulations of the Department of the Interior concerning the Chickasaw-Choctaw Tribe of Indians and is against the plans and policy of the Federal Government in the Distribution of the lands belonging to said Chickasaw-Choctaw Tribe of Indians.

VIII.

The court further finds that since the filing of this action, the defendant, Wilson Gardner has died without issue and intestate, leaving as his heirs at law, his widow, Phelina Gardner and Anderson Gardner and there has been no regular administrator of his estate appointed, and that this cause of action should be revived in the

name of the said Phelina Gardner and Anderson Gardner. And the court finds that this cause was regularly and legally revived in the name of said Phelena Gardner and Anderson Gardner the only heirs at law of said Wilson Gardner.

IX.

The court further finds that the defendants at the time of the execution of said two deeds on January 6th, 1906, to J. S. Mullen
206 and L. V. Mullen and Mrs. Alice Mitchell, the defendants, Wilson Gardner and Anderson Gardner, each received $347.10, and that they each received $48.75 for their interests in the thirty (30) acres described in paragraph five hereof, and that the defendants, Wilson Gardner and Phelina Gardner, now make no claim to said thirty (30) acres.

X.

The court further finds that the defendants, Wilson Gardner and Phelina Gardner tendered into court for the benefit of the plaintiffs the sum of $629.20.

XI.

The court further finds that the said defendant, Anderson Gardner is now the owner of an undivided three-fourths interest in the land described in paragraph one hereof, and that the defendant, Phelina Gardner is the owner of an undivided one-fourth interest in and to the lands described in paragraph one herein, and that the defendants are entitled to the immediate possession of said land described in paragraph one hereof.

It is therefore, by the court decreed, ordered and adjudged by the court that the title and possession of the said defendants, Anderson Gardner and Phelina Gardner in the lands described in paragraph one hereof be, and the same is hereby forever settled and quieted in them as against all claims or demands of said plaintiffs and those claiming or to claim under them, or any of them; and that the deed from Wilson Gardner, Anderson Gardner and Nancy Gardner, to J. S. Mullen and L. V. Mullen, dated the 6th day of January, 1906, and recorded in the 21st Recording District of the Indian Territory at Book 32 at page 423 and of record in the office of the Register of deeds of Stephens County, Oklahoma, in Book 44, at pages
207 169 170 Miscellaneous, and the deed from Wilson Gardner, Anderson Gardner and Nancy Gardner to Mrs. Mattie Mitchell, dated the 6th day of January, 1906, and of record in the 21st recording district of the Indian Territory in Book 20 at page 409, and of record in the office of the Register of Deeds, in Stephens County, Oklahoma, in Book 44, at pages 170-171-172 Miscellaneous, and all other deeds or documents in said chain of title claimed by plaintiffs be, and the same are hereby cancelled and removed as clouds on the title of the defendants, Anderson Gardner and Phelina Gardner in and to said lands described in paragraph one hereof,

which was contained in the two deeds executed by Wilson Gardner, Anderson Gardner and Nancy Gardner on the 6th day of January, 1906, L. V. Mullen, J. S. Mullen and Mrs. Alice Mitchell be, and the same are hereby declared null and void.

It is further ordered, decreed and adjudged that said defendants Anderson Gardner and Phelina Gardner pay to said plaintiffs the sum of $629.20.

It is further ordered, decreed and adjudged that the defendant Anderson Gardner is the owner of an undivided three-fourths interest in and to the lands described in paragraph one hereof, and the defendant Phelina Gardner is the owner in fee simple of a one-fourth undivided interest in and to the lands described in paragraph one hereof, and the title to said land is hereby quieted in them.

It is further ordered, decreed and adjudged that said plaintiffs, J. S. Mullen and L. V. Mullen, and those claiming through, by or under them be, and they are hereby perpetually enjoined and
208 forbidden to claim any right, title, interest or estate in or to said premises by virtue of said deeds, or either of them, hostile or adverse to the possession and title of the defendants, Anderson Gardner and Phelina Gardner; and said plaintiffs, J. S. Mullen and L. V. Mullen, and those claiming under them, are hereby perpetually enjoined from commencing any suit to disturb the said defendants Anderson Gardner and Phelina Gardner in their said possession and title to said premises, described in paragraph one hereof, from setting up any claim or interest adverse to the title of said defendants herein, and from disturbing defendants in their peaceable and quiet enjoyment of said described premises.

It is further adjudged that the defendants have and recover their costs from said plaintiffs.

To which judgment of the court the plaintiffs except.

(Signed) FRANK M. BAILEY,
District Judge."

Endorsed on back as follows: No. 1069. L. V. Mullen and J. S. Mullen, Plaintiff-, vs. Nancy Gardner, Wilson Gardner and Anderson Gardner, Defendants. Judgment and Journal Entry. Filed Nov. 4, 1913. M. J. Davis, Clerk District Court, by F. Frensley, Deputy. Recorded, Jou-nal #4, at page 560."

209 And be it remembered, that on the 4th day of November, 1913, the Plaintiffs filed in said cause their Motion for a new trial, which said Motion for a new trial being in words and figures as follows, to-wit:

"In the District Court of Stephens County, Oklahoma, at Duncan.

L. V. MULLEN et al., Plaintiffs,

vs.

WILSON GARDNER et al., Defendants.

Motion for New Trial.

Now comes the plaintiffs and make this their Motion for new trial, and as grounds therefore, state the following:

First. The court erred in admitting evidence on the part of the defendants, over the objection of the plaintiffs, which was excepted to by the plaintiffs at the time.

Second. The court erred in sustaining objections on the part of the defendants to testimony offered by the plaintiffs, which was excepted to by the Plaintiffs at the time.

Third. The judgment of the court is contrary to the law.

Fourth. The judgment is contrary to the evidence.

Fifth. The judgment is contrary to the law and the evidence.

Sixth. The court erred in refusing to give judgment in favor of the Plaintiffs and against the defendants for the money paid by the plaintiffs to the defendants for the purchase price of the land originally sold by the defendants and their grantors and heirs to these plaintiffs.

For all of which reasons, plaintiffs pray that the judgment entered herein, be set aside and held for naught and that a new trial be granted them, for which they will ever pray.

H. A. LEDBETTER,
Atty. for Plaintiffs."

210 Endorsement on back: No. 1069. L. V. Mullen et al. vs. Wilson Gardner et al. Motion for new trial. Filed Nov. 4, 1913. M. J. Davis, Clerk District Court, by F. Frensley, Deputy. H. A. Ledbetter, Attorney for Plaintiffs."

And be it remembered that on the 5th day of November, 1913, the court made an order in said cause overruling the Motion of the Plaintiffs for a new trial and granting time for appeal, which said Order of the Court is in words and figures as follows, to-wit:

"In the District Court of Stephens County, State of Oklahoma.

Order Overruling Motion for New Trial.

L. V. MULLEN et al., Plaintiffs,

vs.

WILSON GARDNER et al., Defendants.

On this the 5th day of November, 1913, came on to be heard the motion of the plaintiffs for a new trial; and the court after hearing same and sufficiently advised in the premises is of the opinion that said motion should be overruled.

It is therefore ordered, adjudged and decreed by the Court that the motion of the plaintiff herein for a new trial be and the
211 same is hereby overruled. To which action of the court in overruling said motion for a new trial, the plaintiffs at the time in open court duly except. And thereupon, plaintiffs in open court ask for time within which ti prepare and serve a case made on appeal, and the court being of the opinion that the case made could not be prepared and served within the statutory period of three days,

it is therefore, hereby further ordered, adjudged and decreed that the plaintiffs be and they are hereby granted an additional time of ninety days within which to prepare and serve their case made and the defendants allowed ten days thereafter to suggest amendments and the case made to be settled and signed upon five days' written notice by either party.

And the plaintiffs asking for permission to supersede said judgment and the court being of the opinion that a supersedeas should issue, but before the same becomes effective, a good and sufficient Bond in the sum of One Thousand ($1000.) Dollars should be made, it is therefore hereby further ordered that the plaintiffs be allowed sixty days within which to file a bond in the sum of One Thousand Dollars, which bond when filed and approved by the Clerk of this Court execution hereon shall be stayed, and pending the making of said bond on appeal, execution is hereby stayed.

FRANK M. BAILEY,
Judge of the District Court of Stephens County, Oklahoma.

212 Endorsements on back as follows: No. 1069. L. V. Mullen et al. vs. Wilson Gardner et al. Order overruling motion for a new trial. Filed Nov. 5, 1913. M. J. Davis, Clerk of District Court, by F. Frensley, Deputy. Recorded Journal No. 3, Page 610.

And be it remembered that on the 28th day of January, 1914, the court made an order in said cause extending the time within which the plaintiffs should prepare and serve their case made in said cause; which said order of the court is in words and figures as follows, to-wit:

213 In the District Court of Stephens County, State of Oklahoma.

No. 1069.

L. V. MULLEN et al., Plaintiffs,

vs.

WILSON GARDNER et al., Defendants.

Order Extending the Time to Serve Case Made.

Now on this the 28th day of January, 1914, came on for hearing the application and motion of the plaintiff herein for an additional extension of time within which to prepare and serve their case made in said cause; and it appearing to the court that the stenographer for said court has been unable to prepare the record in said cause within the time heretofore allowed by the court and that the plaintiffs should have a further extension of time within which to serve their case made herein;

It is ordered, cons-dered and adjudged that plaintiffs be and they are hereby given and allowed an additional extension of thirty (30) days, from and after the expiration of the time heretofore allowed by the court, within which to prepare and serve the-r case made herein on the defendants; the defendants allowed ten days after the service of same within which to suggest amendments and said case made to be settled and signed on five days' notice thereafter by either party.

FRANK M. BAILEY,
District Judge.

Endorsements on back: No. 1069. L. V. Mullen et al., Plaintiffs, vs. Wilson Gardner et al., Defendants. Order extending time to serve case made. Filed in District Court January 29th, 1914. M. J. Davis, Clerk, by F. Frensley, Deputy. Journal No. 2, page —.

214 The Above and Foregoing case made contains a full, true, complete and correct record and transcript and copy of all the evidence offered in the trial of the above and foregoing cause; all of the pleadings and papers filed in said cause, all of the orders, rulings, holdings and judgments of the court made and entered in said cause, all of the motions, objections, and exceptions of Counsel, and all other proceedings had in said cause, both written and oral, and the same and all thereof are full, true, complete and correct and I do so certify.

215 In the District Court of the Fifteenth Judicial District of the State of Oklahoma; in and for Stephens County.

No. 1069.

L. V. MULLEN et al., Plaintiffs,

vs.

WILSON GARDNER et al., Defendants.

Certificate of Clerk.

STATE OF OKLAHOMA,
County of ——, ss:

I, M. J. Davis, Clerk of the District Court in and for Stephens County, State of Oklahoma, hereby certify that the above and foregoing case made contains a full, true, complete and correct copy of all the pleadings and papers filed in said cause, all of the orders, rulings, holdings and judgments made and entered in said cause as the same now appears of record and on file in my office, and I do so certify.

Given under my hand and the Seal of said court on this the 2nd day of April A. D. 1914.

[SEAL.]

M. J. DAVIS,
Clerk of the District Court,
Stephens County Okla.,
By FRANK FRENSLEY, *Deputy.*

Certificate of Clerk.

216 In the District Court of the State of Oklahoma in and for the County of Stephens 15th District.

No. 1069.

L. V. MULLEN et al., Plaintiffs,

vs.

WILSON GARDNER et al., Defendants.

Service of Case Made.

To R. C. Martin and Womack & Brown, attorneys of record for the above named Defendants:

You are hereby and herewith served with a copy of the case made in the above styled and entitled cause whereby and wherein the above named Plaintiffs appeals from the orders, holdings, rulings and judgments of the court made and entered in the above entitled cause t othe Supreme Court of the State of Oklahoma, by case made.

H. A. LEDBETTER,
Attorneys of Record for the
Above Named Plaintiffs.

Service of Copy of the Above and Foregoing case made is hereby acknowledged to have been made on the undersigned, on this the 9th day of February, A. D. 1914.

R. C. MARTIN AND
WOMACK & BROWN,
By R. C. MARTIN,
Attorneys of Record for the Above
Named Defendants.

Service of Case Made.

217 In the Supreme Court of the State of Oklahoma.

L. V. MULLEN and J. S. MULLEN, Plaintiffs in Error,

vs.

ANDERSON GARDNER, NANCY GARDNER and PHELENA GARDNER, Defendants in Error.

Waiver of the Issuance of Summons in Error in the Supreme Court.

Comes now the defendants in error, Anderson Gardner, Nancy Gardner and Phelena Gardner, sole heirs at law of Wilkin Gardner, deceased, by their attorneys of record, and hereby enter their appearance in said cause in the Supreme Court of Oklahoma, and hereby waive the issuance and service of summons in error in said cause in said Court.

Given under our hands on this the 9th day of February, A. D., 1914.

R. C. MARTIN AND
WOMACK & BROWN,
By R. C. MARTIN,
Attorneys of Record for the Above Named Defendants in Error.

Filed Apr. 6, 1914. W. H. L. Campbell, Clerk.
Waiver of the Issuance of Summons in Error.

218 In the District Court of the 15th Judicial District of the State of Oklahoma in and for Stephens County.

No. 1069.

L. V. MULLEN et al., Plaintiffs,

vs.

WILSON GARDNER et al., Defendants.

Stipulation and Agreement of Counsel.

It Is Hereby Stipulated and Agreed by and between the Counsel for the Plaintiff and defendant in the above entitled cause:

That the above and foregoing record and case made contains a full, true, and correct record of all the evidence and pleadings in said cause, all of the orders and judgments of the court and all other proceedings had in said cause. The parties hereto hereby waive the suggesting of further amendments to the same and consent and agree that the Judge of said court may sign, settle and allow the same as such true and correct record and case made in said cause without notice of the time and place of settling same be given by either party.

Given under our hands on this the 9th day of February A. D., 1914.

H. A. LEDBETTER,
Attorneys of Record for the Above Named Plaintiffs.
R. C. MARTIN AND
WOMACK AND BROWN,
By R. E. MARTIN,
Attorneys of Record for the Above Named Defendants.

Stipulation and Agreement.

219 In the District Court of the 15th Judicial District of the State of Oklahoma in and for the County of Stephens.

No. 1069.

L. V. MULLEN et al., *Defendants,*

vs.

WILSON GARDNER et al., Defendants.

Certificate of Trial Judge.

STATE OF OKLAHOMA,
County of Stephens, ss:

I, Frank M. Bailey, one of the Judges of the above entitled court and trial Judge in the trial of the above entitled cause; hereby certify that the above and foregoing case made contains a true and correct record and copy of all the evidence offered in said cause, all of the pleadings filed therein, and all of the orders and judgments of the court made and entered in said cause, and the same is a true and correct case made in said cause, and I do so certify.

And, it appearing that the parties hereto have waived the suggesting of further amendments, I now hereby sign, settle and allow the same as such true and correct case made in said cause and direct that the Clerk of said court attest and file the same of record in the above entitled court.

Given under my hand and the seal of said Court, within said District, on this the 2nd day of Apr., A. D., 1914.

FRANK M. BAILEY,
Trial Judge.

Attest:
[SEAL.] M. J. DAVIS,
Clerk of the District Court of Stephens County, Oklahoma,
By FRANK FRENSLEY, *Deputy.*

Filed in District Court Apr. 2, 1914. M. J. Davis, Clerk, by Frank Frensley, Deputy.

Certificate of Judge.

220 Thereafter, to-wit, on November 2nd, 1915, at the October term thereof, the Supreme Court of Oklahoma, made the following order:

No. 6240.

L. V. MULLEN et al.

v.

ANDERSON GARDNER et al.

And now on this day it is ordered by the court that the above cause be set for oral argument on November 29th, 1915.

221 Thereafter, to-wit, on November 29th, 1915, at the October, 1915, term of the Supreme Court of Oklahoma, the following order was made:

No. 6240.

L. V. MULLEN et al.

v.

ANDERSON GARDNER et al.

And now on this day the above cause is argued orally, and the cause is submited, and it is ordered by the court that defendant in error be allowed until January 1st, 1916, to file answer brief.

222 Thereafter, to-wit, on April 11th, 1916, at the April, 1916, term thereof, the Supreme Court of Oklahoma made the following order:

No. 6240.

L. V. MULLEN et al.

v.

ANDERSON GARDNER et al.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be affirmed. Opinion by Bleakmore, C.

By the Court: It is so ordered, the opinion herein is hereby adopted in whole, and judgment is entered accordingly.

223 In the Supreme Court of the State of Oklahoma, Supreme Court Commission, Division No. Three.

No. 6240.

L. V. MULLEN and J. S. MULLEN, Plaintiffs in Error,

v.

ANDERSON GARDNER AND PHELIN GARDNER, Defendants in Error.

(Filed Apr. 11, 1916. William M. Franklin, Clerk.)

Syllabus.

A deed of general warranty executed in 1906 by the heirs of a deceased enrolled member of the Choctaw Tribe of Indians, purporting to convey certain lands which an administrator had attempted to select in the name of such deceased and which are involved in contest, containing a covenant to the effect that if said lands were finally awarded to others as the result of such contest other lands of equal appraised value should be selected in lieu thereof, and the title thereto pass by said deed to the grantees therein, or if required such grantor heirs would execute a subsequent deed so conveying the lands to be thus selected, Held, that such deed is inoperative and void as a conveyance of, or contract to convey, lands allotted in the name of such deceased in 1910, and which at the date the deed constituted part of the tribal domain.

Error from District Court of Stephens County.

Frank M. Bailey, Judge.

Action by L. V. Mullen and J. S. Mullen against Wilson Gardner, Nancy Gardner and Anderson Gardner. Judgment for defendants, and plaintiffs bring error.

Affirmed.

H. A. Ledbetter, Attorney for Plaintiffs in Error.

R. C. Martin and Womack & Brown, Attorneys for Defendants in Error.

224 *Opinion of the Court.*

By BLEAKMORE, *C.*:

Wilkin Gardner, an enrolled member of the Choctaw Tribe of Indians, died in 1905, prior to the selection of his allotment. On January 3, 1906, application was regularly made by the duly appointed administrator of his estate, Howard McBride, to select and

have certain lands allotted in his name, but it appearing that such lands had been previously selected as portions of the allotments of other members of the tribe, said administrator immediately instituted contest proceedings to have determined his right to select the same in the name of said decedent. On January 6, 1906, the heirs of said Wilkin Gardner executed deeds of general warranty purporting to convey to the grantees therein the lands so attempted to be selected by said administrator and involved in contests. The deeds contain the following provision:

"* * * and if for any reason the said lands hereinbefore filed upon, selected and allotted to the said Wilkin Gardner, shall be adjudged by any tribunal not to be the lands of the said Wilkin Gardner, that in that event the said Howard McBride, or his successor shall select, file upon and allot other lands of equal appraised value of that described herein, and all of the warranties and covenants herein shall extend to and cover said land so selected filed upon and allotted and that this conveyance shall extend to and convey all of said land, and if for any reason it should be necessary for another deed to be executed in order for a title in fee simple to pass to the said J. S. and L. V. Mullen, then in that event we do for ourselves, our heirs, executors and administrators represent and warrant unto the said J. S. and L. V. Mullen, their heirs and assigns that we will execute such a deed conveying the same as aforesaid."

The administrator ultimately failed in the contest proceedings, and the lands for which he had applied were awarded to the contestees. Thereafter, in 1910, other lands of equal appraised value were allotted in the name of said Wilkin Gardner, deceased, in lieu of those embraced in the proposed selection by the administrator and described in the deeds of said heirs. By virtue of the
225 foregoing provision in said deeds, plaintiffs in error assert title to the lands actually allotted in the name of said deceased.

By act of Congress approved July 1, 1902, and ratified by the Choctaw and Chickasaw Nations September 25, 1902, known as the Supplemental Agreement, it is provided:

Sec. 11. "There shall be allotted to each member of the Choctaw and Chickasaw tribes, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to three hundred and twenty acres of the average allot-able land of the Choctaw and Chickasaw nations * * *

Sec. 15. "Lands allotted to members and freedmen shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this Act, nor shall said lands be sold except as herein provided.

Sec. 22. "If any person whose name appears upon the rolls, prepared as herein provided, shall have died subsequent to the ratification of this agreement and before receiving his allotment of land the lands to which such person would have been entitled if living shall be allotted in his name, and shall, together with his propor-

tionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: Provided, That the allotment thus to be made shall be selected by a duly appointed administrator or executor. * * *"

The sole question presented for our consideration is whether the deeds made by the heirs of Wilkin Gardner on January 6, 1906, operated to convey the lands allotted in his name in 1910.

It is conceded that, no restriction upon the right of alienation existing, had the lands described therein been allotted at the date thereof, said deeds would have passed title thereto. Mullen v. U. S., 224 U. S. 457, 58 L. Ed. 834. But it is urged by defendants in error that said deeds were ineffective to convey title to the then unallotted lands which it was contemplated might be, and in fact were, subsequently selected in the name of the deceased, for the reason that no inheritable right could exist in tribal lands. Speak-
226 ing to the point involved, this court in Bledsoe v. Wortman et al., 35 Okla. 261, 129 Pac. 841, quoted with approval the language used by the United States Court of Appeals for the Eighth Circuit, in McKee v. Henry, 201 Fed. 74, as follows:

"The Muskogee or Creek Tribe was in the nature of a dependent nation, and, as our national public buildings belong to the nation, the citizen, while he has an interest in them has no share in the title to them, so these lands, so far as the Indian title was concerned, belonged to the tribe as a community, and no separate Indian had any title whatever severally or as a tenant in common. No law or agreement to divide the lands in severalty had any effect to create such a title until the lands were actually allotted. All these laws contemplated that the tribe, through its members, would receive substantially the whole reservation in lands or money. If the right to lands was vested after enrollment, and before allotment, then why was the interest of the Indians not actually vested in the remaining lands and money? Yet it was expressly held in Gritts v. Fisher, 224 U. S. 640, (32 Sup. Ct. 580, 56 L. Ed. 928), that the interest in the remaining lands and money was not vested, and that new participants could be added by Congress. The enrolling primarily established the right of citizenship, and only incidentally conferred the right to allotment, and, until allotment was made, no inheritable right vested in the individual Indian.

* * * * * * *

"When the allotment was made, for the first time the rights of any individual vested, and the title became vested in the one at that time fixed by the law, and it makes no difference what previous laws may have provided."

In Hooks v. Kennard, 28 Okla. 457, Mr. Chief Justice Kane, speaking for the court, said:

"This court has held in several cases that the selection of and the filing upon an allotment of land was the inception and beginning of the title of the allottee or his heirs, and that, when the patent

which is only the evidence of title is issued, it relates back to the inception of the title. De Graffenried v. Iowa Land & T. Co., 20 Okla. 687, 95 Pac. 624; Godfrey v. Iowa Land & T. Co., 21 Okla. 293, 95 Pac. 792; Irving et al. v. Diamond, 23 Okla. 325, 100 Pac. 557."

In Stephens v. Cherokee Nation, 174 U. S. 445, 43 L. Ed. 1041, with reference to the lands of the Choctaw and Chickasaw Tribes, as well as those of the other Five Tribes, it was said:

"The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the
227 assertion of any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms."

In Franklin v. Lynch, 233 U. S. 269, 56 L. Ed. 954, (affirming Lynch v. Franklin, 37 Okla. 60), it is said:

"* * * The Revised Statutes (sec. 2118) declare that no conveyance from an Indian tribe shall be of any validity in law or in equity unless authorized by treaty. As the tribe could not sell, neither could the individual members, for they had neither an undivided interest in the tribal land nor vendible interest in any particular tract."

See also, Wallace v. Adams, 143 Fed. 716; Sanders v. Sanders, 28 Okla. 759, 117 Pac. 388; Robinson et al. v. Caldwell et al., (#5165, not yet officially reported).

In Mullen et al. v. Pickens et al., (#6020, not yet officially reported), it was held:

"A warranty deed from a restricted full-blood Choctaw Indian of September 23, 1905, whereby she conv-yed all her interest in and to the theretofore selected allotment of her deceased mother, and which deed contained a provision: 'That I further warrant and covenant with the said J. S. Mullen and L. V. Mullen and W. M. Bonner, that if, for any reason the allotment of the said Eliza Bell, deceased, as described be cancelled, set aside and held for naught, and afterwards be filed at any point in the Choctaw or Chickasaw country, that this deed and its warranties and covenants, shall apply to said lands so hereafter selected the same as if it were described in this instrument, and if it be necessary for me to hereafter execute the deed to the lands so selected, I hereby covenant and warrant to the said J. S. Mullen and L. V. Mullen, their heirs, legal representatimes, and assigns that I will so execute said deed,' did not by virtue of said provision, when subsequent thereto the selection of the land particularly described in the deed, was cancelled and annulled by the proper authorities, convey an equitable title to such after allotted land, concerning which, Malinda Pickens will be required to specifically perform. And where the pleadings show the *the* above state of facts, it is not error for the court to sustain demurrer to the answer and award judgment for the plaintiff."

The power to alienate allotted lands is recognized as an inherent property right which may be exercised by the owner unless restrained by congressional enactment; but is entirely foreign to the

power to sell tribal property, which exists only by virtue of specific federal authorization.

228 It is established that before the same was selected and set apart to him in the prescribed manner, a living member was denied any right to convey the distributive share of tribal lands to which his enrollment entitled him; and a declaration of its purpose by statute in unequivocal terms would be required to convince us that, by permitting his heirs to succeed to such share in the event of his death before its selection, congress intended that they should acquire with regard thereto a right, withheld from all others, to alienate the same while the title remained in the tribe. It is solely by virtue of Sec. 22 of the Act of July 1, 1902, supra, that the heirs of a deceased member succeeded to his right to share in the distribution of tribal property provided for by that and prior federal legislation; and clearly it was not contemplated thereby that such heirs should take, as by descent, a present estate in tribal lands such as could never have been enjoyed by the one through which it came. But the obvious purpose of such enactment was to provide for the transmission of title to the particular lands, and proportionate share of other property, to which a deceased member of the tribe would have been entitled had he survived, only when the same should become individual, as contradistinguished from tribal property, by being selected and allotted in his name.

We therefore conclude that notwithstanding they contained covenants expressly to that effect, the deeds by the heirs of Wilkin Gardner, of January 6, 1906, were inoperative and void as conveyances of, or contracts to convey, the lands subsequently allotted in his name and which at the date thereof constituted part of the tribal domain. Such was the view of the trial court, and its judgment should be affirmed.

229 *Certificate.*

I, William M. Franklin, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing 228 pages numbered from 1 to 228, inclusive is a true and complete transcript of the record and all proceedings in said Supreme Court in the case of

No. —.

J. S. MULLEN et al., Plaintiffs in Error,

vs.

MALINDA PICKENS et al., Defendants in Error,

as the same remains of record and on file in this office.

In witness whereof, I hereunto set my hand and attach the seal of said Court at the City of Oklahoma City, this 2 day of March, A. D. 1917.

[Seal Supreme Court, State of Oklahoma.]

WILLIAM M. FRANKLIN, *Clerk.*
By N. C. ORR, *Assistant.*

Endorsed on cover: File No. 25812. Oklahoma Supreme Court. Term No. 146. L. V. Mullen and J. S. Mullen, plaintiffs in error, vs. Anderson Gardner and Phelin Gardner. Filed March 8th, 1917. File No. 25812.

FEB 6 1913
JAMES D. MAHER,
CLERK

In the Supreme Court of the United States

L. V. MULLEN ET AL,
Plaintiffs in Error,

VS. No. [illegible]

ANDERSON GARDNER, ET AL,
Defendants in Error.

FRED R. ELLIS
F. M. ADAMS
Attorneys for Plaintiffs in Error

AUTHORITIES CITED

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Crews vs. Burcham, 1 Black 252, (17 L. Ed. 91).

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In the Supreme Court of the United States

L. V. MULLEN ET AL,
Plaintiffs in Error,

VS. No. 146

ANDERSON GARDNER, ET AL,
Defendants in Error.

STATEMENT OF CASE

The plaintiffs in error, L. V. Mullen and J. S. Mullen, filed this suit in the District Court of Stephens County, Oklahoma,, alleging that they were owners in fee simple, and in the actual peaceable and exclusive possession of certain lands in Section 7, Township 5 South, Range 2 East; and in Section 25, Township 1 South, Range 2 West; and in Section 23, Township 8 South, Range 2, West; and in Section 4, Township 3 South,

Range 7 West; and in Section 18, Township 4 North, Range 7 West; and in Section 3, Township 5 South, Range 2 East; and in Section 8,Township 5 South, Range 7 East; and in Section 34, Township 4 South, Range 2 East; the same being the allotment of Wilkin Gardner; and that they derived their title to said lands by reason of the fact that the lands in controversy were allotted to and in the name of Wilkin Gardner, deceased, after his death; that at the time of the death of the said Wilkin Gardner he left surviving him as his sole and only heirs the defendants, Wilson Gardner, Anderson Gardner and Nancy Gardner, who inherited the allotment of the said Wilkin Gardner, deceased; that thereafter, and on the 6th day of January, 1906, the defendants Wilson Gardner, Anderson Gardner and Nancy Gardner, for a good and valuable consideration, made, executed and delivered their certain deed of conveyance to the following described lands, to-wit:

The E½ of NW¼ of SE¼; the S½ of NE¼ the NE¼ of SE¼; the N½ of NW¼ of SE¼; the SE¼ of NW¼ of SE¼; the NE¼ of NE¼ of SW¼, Section 6 Township 3 South, Range 1 East;

Conveying Same to Mrs. Hattie Mitchell, and that they warranted the title to the same to the said Mattie Mitchell, and further covenanted that if for any reason the lands hereinbefore described as filed upon, selected and allotted to the said Wilkin Gardner, should be adjudged by any tribunal now in existence or that might

hereafter be created not to be the land of the said Wilkin Gardner, then, in that event, the administrator or his successor, shall file upon and select other lands of equal appraised value to those described herein, and that all the warranties and covenants shall extend to and cover said lands so selected, filed upon and alloted, and this conveyance shall extend to and convey all such land, and if for any reason it should be necessary for another deed to be executed in order that the title in fee simple shall pass to the said Mrs. Mattie Mitchell, then and in that event, the said said grantors, for themselves, their heirs, executors and administrators, represented and warranted unto the said Mattie Mitchell, her heirs and assigns, that they would execute such a deed, conveying the same as aforesaid; and that said deed was regularly recorded in the office of the Register of Deeds of the County wherein said lands were situated, and attached to said petition a copy of said deed. It was then alleged that Mrs. Mattie Mitchell conveyed and sold by warranty deed the land so conveyed to her to Bonner and Mullen, and that Bonner conveyed all his interest in and to said lands to J. S. Mullen and to such land as was selected in lieu thereof. It was then alleged that on the 6th day of January 1906, Wilson Gardner, Anderson Gardner and Nancy Gardner conveyed by warranty deed to J. S. Mullen and L. V. Mullen the following described land, to-wit:

The E½ of NW¼ of SW¼, Section 8 Township 5 South, Range 7 East; the NW¼ of SW¼ of SE¼, Sec-

tion 3, Township 5 South, Range 2 East; the SW¼ of NE¼ of SE¼, Section 34, Township 4 South, Range 2 East, being a portion of the allotment of Wilkin Gardner, deceased: and that said grantors warranted the title to the same.

In said deed of conveyance it is further covenated:

> "And if for any reason the lands herein-before filed upon selected and allotted by said Wilkin Gardner should be adjudged by any tribunal not to be the land of the said Wilkin Gardner, then and in that event the administrator or his successor should select, file upon and allot other lands of equal appraised value of that described in said deed, and that this conveyance shall extend to and convey all of said lands so selected, filed upon and allotted, and that this conveyance shall extend to and cover all said lands, and if for any reason it should be necessary for another deed to be executed in order for title in fee simple to pass to the said J. S. Mullen and L. V. Mullen, then and in that event we do for ourselves, our heirs, executors and administrators, represent and warrant unto the said J. S. Mullen and L. V. Mullen, their heirs and assigns, that we will execute such conveyance conveying the same as aforesaid."

That said conveyance was regularly recorded in the office of the Register of Deeds of the county wherein said land was situated on the 22nd day of May, 1906, and a copy of said deed was attached to plaintiff's petition. It was then alleged that the lands mentioned in

paragraphs 3 and 5 of the petition filed in the trial court were first selected and filed upon and constituted the entire allotment of Wilkin Gardner, deceased, and that the filing on all of the lands mentioned in paragraph 3 of said petition filed in the trial court, was cancelled and a portion of the land described in paragraph 1 of plaintiff's petition in the trial court was filed upon and allotted to Wilkin Gardner in lieu of the lands from which his first filings were cancelled, and that patents issued to and in the name of Wilkin Gardner for the lands so selected in lieu of the lands for which the filing was so cancelled; and that by the terms of said deeds, "Exhibits D and C" to plaintiffs' said petition in the trial court, all the rights in and to the lands selected in lieu of the lands conveyed in paragraphs 3 and 5 of plaintiffs' said petition were conveyed by the deeds aforesaid mentioned to these plaintiffs in error, and all of the rights, titles and privileges accompanying ownership inured to the benefit of these plaintiffs to all the lands allotted to and in the name of Wilkin Gardner, deceased.

It was then alleged that the plaintiffs have been in possession of said lands from before the time of filing and up to and including the present time, under said deed as aforesaid, and have been collecting the rents, revenues and profits from the same and enjoying all the rights of ownership, and the defendants, Wilson Gardner, Anderson Gardner and Nancy Gardner, are asserting some right, title or estate in and to said lands described in paragraph one of plaintiffs' petition, by

reason of being the heirs of Wilkin Gardner, deceased; and that the pretended claim of the defendants was without right, and that said defendants had no right, title, or interest in or to said lands, they having conveyed the same by their said deeds as aforesaid. It was then alleged that the pretended claim constituted a cloud upon the title of these plaintiffs and that unless the same was cancelled and set aside the plaintiffs would suffer irreparable injury. It was then alleged that the said defendants were trying to sell said lands to other parties, and unless prevented by restraining order they would sell the same and thereby further cloud the title of these plaintiffs.

The prayer of the petition was, first, that the defendants in error be enjoined and restrained from making, executing or delivering any deed or conveyance on the lands mentioned in paragraph 1 of the petition and from disturbing the plaintiffs in their said possession pending the judgment of the court, and praying for a temporary restraining order restraining defendants from executing any deed covering the lands in paragraph 1 of said petition, and that the defendants be decreed to convey said premises to the plaintiffs herein by warranty deed and in default thereof that the court require, by order, the sheriff of the county to make, execute and deliver to the plaintiffs a warranty deed to said lands described in paragraph one of plaintiffs' said petition, and that the court order and adjudge that the same shall be and have the same effect as if executed

by the defendants in their own person; and praying further that the defendants be required to set forth the nature of their claims, if any, and that the court decree the plaintiffs' rights and title to the lands as described in paragraph one of plaintiffs' said petition, being the lands allotted to Wilkin Gardner, to be valid and perfect and the defendants have no right, title or claim therein, and the defendants, and each of them, be perpetually barred and enjoined from setting up, or asserting any title or interest in said premises adverse to this plaintiff, and for such other and further relief as they are entitled to. (See Trans. of record, pages 14 to 28 inclusive.)

The defendants interposed their demurrer, as shown on page 28 of the transcript of record, and thereafter filed their answer, wherein they admit the allotment of the land in the manner set out in plaintiffs' said petition, and admitted the deeds were executed to the plaintiffs in error and their grantors to the lands as selected in the name of Wilkin Gardner, deceased. The defendants in error denied that the plaintiffs in error were the owners of the land described in paragraph one of plaintiffs petition in the trial court, except the NW½ of SW¼ of SE¼ of Section 3, Township 5 South, Range 2 East, and the SW½ of NE¼ of SE¼ of Section 34, Township 4 South, Range 2 East, and the NE¼ of NW¼ of SE¼ of Section 8, Township 5 South, Range 7 East; and they deny that any other land had been designated, selected or alloted to or in the name of

Wilkin Gardner or his heirs. The defendants in error admitted the death of the allottee prior to the selection of the lands, and that Wilkin Gardner left surviving him as his only heirs Wilson Gardner, Anderson Gardner and Nancy Gardner, his wife, and then alleged that Nancy Gardner was dead. It was then alleged that Wilkin Gardner was entitled to have set apart and allotted to him 320 acres of the average allotable lands of the Chickasaw and Choctaw Nations; that he died before the lands had been selected for him; that subsequent to the death of Wilkin Gardner the said Wilson Gardner and Anderson Gardner, who were both duly enrolled full-blood Indians of the Choctaw Tribe, were entitled to have selected and alloted in the name of their deceased brother, for their sole benefit, said acreage of lands from the tribal lands of the Chickasaw and Choctaw Nations.

It was then alleged that Howard McBride, administrator of the estate of Wilkin Gardner, deceased, on the 3rd day of January, 1906, appeared before the Commissioner to the Five Civilized Tribes and had designated and selected from the tribal lands of said two tribes of Indians, the thirty acres of land described specifically in paragraph 2 of their said answer, the same thirty acres of land described in paragraph 1 of plaintiffs' petition; that no other lands other than the thirty acres were designated, selected or allotted in the name of Wilkin Gardner until the 9th day of September, 1910,

at which time, it was alleged by the defendants in error, there was arbitrarily selected and allotted from the tribal lands of the Chickasaw and Choctaw Tribes of Indians, in the name of Wilkin Gardner, the lands particularly described in paragraph 1 of plaintiffs' petition in the trial court, and that the lands thus selected and the 30 acres aforesaid constituted the entire allotment of Wilkin Gardner, deceased. It was then alleged that they being the heirs at law of Wilkin Gardner, they are now, and have been since the arbitrary selection of said lands as aforesaid, the joint owners in fee simple of the lands described in paragraph 5 of their said answer, and that they have not executed any deed or contract conveying said land or any part to the plaintiffs or any person through whom they claim. It was then alleged that the plaintiffs claim title through their deed as of date January 6, 1906, and the covenants therein. but that said deeds and covenants were in conflict with the laws, treaties, rules and regulations, and that they operated against the plan and policy of the Federal Government in the proper distribution of the tribal lands. There were further allegations in the answer, but we deem them immaterial for the purpose of presenting the question of law that we will hereafter raise.

The prayer of the answer was that the relief prayed for by the plaintiffs in error be denied and that the

defendants in error be decreed to be the owners of the title, and that the conveyance of the plaintiffs in error be cancelled as a cloud upon their title. The answer of the defendants in error will be found commencing on page 30 of the transcript and ending on page 34 thereof.

There was a demurrer to this answer filed, which demurrer was overruled. (See transcript page 35.)

The death of Nancy Gardner was suggested, as shown on page 36 of the transcript and the case was revived. The plaintiffs in error then filed their reply wherein they denied all and singular the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11, reserving, however, their demurrer and exceptions to paragraph 10, as shown by their demurrer.

For further reply the plaintiffs in error stated that Wilson Gardner and Anderson Gardner received of the plaintiffs and their grantors $1041.00 as the purchase price of the allotment of Wilkin Gardner, deceased, which said sum of money was paid to the defendants in error in full consideration for the land first selected by the administrator, and that by the covenants in said conveyance said sum of $1041.00 was made the consideration for the lands involved herein.. (See transcript pages 36 and 37.)

The defendants filed their amended answer, wherein they tendered something over $600.00, which sum of money they said they had received.. The cause proceed-

ed to trial, and Mr. H. A. Ledbetter, representing the plaintiffs in error (plaintiffs below) made his statement; and thereafter Mr. Martin, one of the attorneys for the defendants in error (defendants below), made his statement; which statement so made will be found commencing on page 39 and ending on page 41 of the transcript; and after said statements were made a motion for judgment upon the pleadings was filed, which said motion was overruled and exceptions saved; thereupon motion for judgment upon the opening statement of counsel was made, which motion was by the court overruled and exceptions were saved. (See bottom of page 41 transcript.) The cause then proceeded to trial, as shown commencing on page 42 of the transcript.

The testimony in the case shows, in short, that an application for the lands selected in January, 1906, was made before the Commissioner to the Five Civilized Tribes, as shown on pages 42 and 43 of the transcript, and that this application was denied (transcript, page 45.)

Other lands were applied for by Howard McBride as administrator, as shown on pages 45 to 69 inclusive, of the transcript, which application was denied.

A contest was instituted by Howard McBride for the lands described in his application and this contest was decided adversely, with the exception of a portion

of the lands in controversy, all of which is disclosed by the transcript commencing with the contest proceedings and ending on page 71 of the transcript. It appears that after the contest was filed the plaintiffs in error and their grantors took deeds from the heirs of Wilkin Gardner, deceased with covenants for a deed in the event the lands particularly described in the deed were lost in contest. The testimony further shows, as disclosed on page 81 of the transcript, that Howard McBride as the administrator of the estate of Wilkin Gardner, deceased, requested the Commissioner to the Five Civilized Tribes to allot the lands involved in this controversy to Wilkin Gardner, and that the allotment was made in accordance therewith. The homestead and allotment patents were then offered in evidence, as shown on page 91 to 93 inclusive of the transcript.

The testimony further shows that Mrs. Mattie Mitchell conveyed the lands to W. M. Bonner and J. S. Mullen, as disclosed at page 94 of the transcript, and that Bonner thereafter conveyed the lands to J. S. Mullen. The testimony further showed that the plaintiffs in error were in possession of the land. (See transcript, page 97.) The testimony further showed that Wilkin Gardner died in the fall of 1905; that at the time of his death he left as his only heirs the parties who signed the original deeds. The testimony further shows that Wilson Gardner died in the year 1903, and left sur-

viving him Lena Gardner, his widow, and Anderson Gardner, his brother. It is further shown by the testimony that the said heirs executed a deed to the lands in controversy to J. W. or W. J. Whiteman, and the deeds were recorded in the month of February, 1913. This is shown on page 97 of the transcript. This was all the testimony of the plaintiffs in error.

There was testimony offered by defendants in error on matters which we do not feel is material, but all the testimony of the defendants in error admit the facts as set out in the petition in the trial court, and upon which we rely for a reversal of this case. The trial court disagreed with our contention as to the law and entered judgment against us, as shown on page 134 of the transcript.. A motion for a new trial was then filed, was overruled and exceptions were saved, and the case-made and petition in error was filed in the Supreme Court of Oklahoma; and in said petition in error it was alleged as error as follows:

First. That the trial court erred in overruling the motion of the plaintiffs in error for a new trial;

"*Second*: That the trial court erred in holding that the heirs of a deceased Indian who had inherited lands of the Chickasaw-Choctaw Nations under section 22 of the Supplemental Treaty of September 25th, 1902, could not alienate such land so inherited, and erred in holding that an agreement to convey such lands so inherited be-

fore selection was violative of the Treaties between the Chickasaws and Choctaws and the United States, and the trial court erred in refusing to hold valid such a conveyance in favor of the plaintiffs in error;"

(See transcript page.....for petition in error.)

The Supreme Court of the State of Oklahoma, upon hearing said petition in error affirmed the decision of the District Court of Stephens County, Oklahoma, for opinion of court see pages.....to.....of transcript. Thereupon plaintiffs filed their petition for writ of error to the Supreme Court of the United States, and filed their assignment of errors, and said writ of error to this Court was duly allowed. See page..... of transcript

SPECIFICATION OF ERRORS

We only desire to urge the following assignment of error.

"The Supreme Court of of the State of Oklahoma, erred in its construction of Section 22 of the Act of Congress of 1902, ratified by treaty September 25th, 1902, (32 Stat a L.....) wherein said Supreme Court of the State of Oklahoma, held that the deed executed by the defendants in error herein was insufficient to convey the lands selected in lieu of the lands described in said conveyance, for that under said deed so executed, and by reason of said Section 22 of the Act of Congress

ratified September 25th, 1902, the lands so selected in allotment were inalienable and the heirs who inherited said lands, and being the defendants in error herein, were unrestricted in their right of alienation of said lands, and under said conveyance so executed by said heirs, they, the said defendants in error, being citiensz of the United States without restraint as to the character of land, they the said defendants in error, Anderson Gardner and Phelin Gardner, had a lawful right to convey any land that might be selected in lieu of the lands decsribed in said conveyance, and that the defendants in error had a right to contract to convey any lands that might have been selected in lieu of the lands described in the conveyance." (See trans. page 6).

BRIEF AND ARGUMENT.

We feel that there is but one question of law involved in this law suit, and that question is raised in our assignment of error, above quoted.

It is our contention that when a member of the Chickasaw or Choctaw Tribes of Indians died prior to the selection, under Section 22 of the Supplemental Treaty between the Chickasaws and Choctaws and the United States (32 Stts. at Large, 641), the lands the heirs are entitled to, are granted to them by the Government of the United States, and to such an extent that the lands these heirs are entitled to can be alienated by them prior to selection, and that when the selec-

tion is made and the patents therefor issue, by the doctrine of relation, the lands so alloted would inure to the benefit of the grantees. We maintain that there is a distinction between this character of estate in lands from that of the land of a member of the Choctaw or Chickasaw Tribes of Indians is entitled to take for himself; and we feel and believe that when this court shall have read carefully the decision of the Supreme Court of the United States in re Mullen-Jansen vs. United States, 224 U. S., 448, our position will be sustained.

We realize, if the court please, that the Supreme Court of Oklahoma has held in the case of I. P. Bledsoe vs. Wortham, 35 Okla., page 261 (129 Pac., 841), and Lynch vs. Franklin, 36 Okla., page..... (130 Pac., 599)—the latter case having since been affirmed by the Supreme Court of the United States—that a conveyance made prior to the selection was in contravention of the Treaties and Acts of Congress, but we wish to call the court's attention to the fact that in the Bledsoe-Wortham case, *supra*, Justice Williams said:

> "The question of constructive allotment, or where the party had done everything reasonably within his power to select his allotment, by making application, etc., but being wrongfully refused, etc., is not in this case, and as to such probable exception we express no opinion."

So the court will see that the question presented here at this time is an open question and one, to our mind, that should be distinguished from the Bledsoe-Wortham and the Lynch-Franklin cases, *supra*.. Bearing in mind, if the court please, that had Howard McBride as the administrator of the estate of Wilkin Gardner, deceased, been successful in his contest that the plaintiffs in error here would have had the title in fee simple to the lands first selected in allotment, for as a matter of fact and as a matter of law the selection would date from the time of the filing of the application for the land, and Wilkin Gardner having died prior to his selection, the lands both the homestead and surplus, were alienable. (See Mullen-Jansen vs. United States, *supra*.) It was intended by these Indians to convey the landed estate granted them under section 22 of the Suplemental Treaty between the Chickasaws and Choctaws and the United States. This estate, if the court please, was one in the nature of an estate in expectancy, and they were citizens of the United States, freed from all restrictions as to this character of allotment—as was held in the Mullen-Jansen vs. U. S. case, *supra*. Now, when the contest was lost, and when the defendants in error had agreed by their solemn deed of conveyance to convey such other lands as might thereafter be allotted to the said Wilkin Gardner, we at this time challenge the defendants in error to cite us a single decision of a single court of

the Union, and we likewise challenge the defendants error to cite us to a single Act of Congress, or a single provision of any treaty, that prohibits the making of such a contract for conveyance as was made by the defendants in error in this case, as of date January 3, 1906; and, if there be no inhibition against the making of such a contract, why should not a court of equity enforce the same? The policy of the law, as we have always understood it, is to enforce contracts that are lawfully made, unless there is some inhibition against the enforcement of the same.

We invite the court's careful attention to the case of Mann vs. Wilson 64 U. S (23 Howard, 457.) In this case the Indian conveyed by warranty deed before there was even a survey made, and prior to selection, and many years thereafter the land was surveyed and selected. The Indian then died and the heirs claimed that the deed made by their ancestor was void because made prior to selection, but the Supreme Court of the United States held that, by the doctrine of relation, when the selection was made the title to the land inured to the benefit of the grantee. This case is followed in Crews vs. Burcham, 1 Black, 352 (17 L. Ed., 91); Jones vs. Meehan, 171 U. S., page 1; 154 U. S., 163; see also Skipworth vs. Martin, 50 Ark., 41; 46 Ark., 285; 62 U. S., 228; 85 U. S., 805; 99 U. S., 324; 20 Wallace, 590; 14 Minn., 544.

We deem it not necessary to argue and present au-

thorities upon the question that "The intention of the parties, when manifest or where ascertained from the written agreement, must control and be enforced, without regard to inapt expressions or dry words of the contract, unless that intention is directly contrary to the plain sense of binding words of the agreement," for this doctrine is so well settled that we deem it not necessary to cite authorities in support thereof; but it is evident that it was the intention of the defendants in error to convey the landed estate of Wilkin Gardner, and by their solemn conveyance a court of equity should decree the same.

In the case of Mullen-Jansen vs. United States, *supra*, we desire to call the courts especial attention to the fact that the court there said, in effect, that where lands were allotted under Section 22 that this character of land was a grant from the Government direct to the heirs, and that there were no restrictions against the right of alienation of such lands, and Justice Hughes, in writing the opinion, cited the cases of Mann vs. Wilson; Crews vs. Burcham; Jones vs. Meehan, *supra*, in support of the doctrine here contended for, and we can but feel that the cases cited, *supra*, are squarely in point as to this character of an estate.

Respectfully submitted,

FRED R. ELLIS
F. M. ADAMS
Attorneys for Plaintiffs in Error

SUPREME COURT OF THE UNITED STATES.

Nos. 25 and 26.—October Term, 1919.

J. S. Mullen, L. V. Mullen, W. M. Bonner, and Will Trout, Plaintiffs in Error, 25 *vs.* Malinda Pickens, Frances Bell, and T. E. Glover.	In Error to the Supreme Court of the State of Oklahoma.
L. V. Mullen and J. S. Mullen, Plaintiffs in Error, 26 *vs.* Anderson Gardner and Phelin Gardner.	

[November 10, 1919.]

Mr. Justice Pitney delivered the opinion of the Court.

These cases were submitted together and involve but a single question, which turns upon the effect to be given to the provisions of the Supplemental Agreement with the Choctaw and Chickasaw tribes of Indians (Act of July 1, 1902, Ch. 1362, 32 Stat. 641) relating to the allotment of the tribal lands. In each case an enrolled Indian died subsequent to the ratification of the Agreement and before selection of an allotment; in each case the personal representative selected lands for allotment in the name of the deceased Indian, which shortly afterwards were attempted to be conveyed by the heirs of such Indian by warranty deeds through which plaintiffs in error claim, each of which deeds contained a clause to the effect that if for any reason the selection of the lands described in the deed should be set aside, other lands should be selected instead, and these should pass to the grantees, and the grantors would execute further conveyances if necessary. In each case the selection for allotment thus made was set aside in contest proceedings, and another selection thereafter made, followed by an allotment in the name of the deceased Indian. And the question is whether plaintiffs in error, by virtue of the deeds for the prior selections and the special covenants contained in them, are entitled

in equity to the lands subsequently allotted. The Supreme Court of Oklahoma held not. *Mullen* v. *Pickens*, 56 Okl. 65; *Mullen* v. *Gardner*, 57 Okl. 186. Its judgments were entered before the taking effect of the Act of September 6, 1916, Ch. 448, 39 Stat. 726, amending sec. 237, Judicial Code, and the present writs of error were applied for and allowed within the time permitted by sec. 7 of the amending act.

Pertinent provisions of the Supplemental Agreement are set forth in the margin.*

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*11. There shall be allotted to each member of the Choctaw and Chickasaw tribes, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to three hundred and twenty acres of the average allottable land of the Choctaw and Chickasaw nations, and to each Choctaw and Chickasaw freedman, as soon as practicable after the approval by the Secretary of the Interior of his enrollment, land equal in value to forty acres of the average allottable land of the Choctaw and Chickasaw nations; * * *.

12. Each member of said tribes shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to one hundred and sixty acres of the average allottable land of the Choctaw and Chickasaw nations, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and separate certificate and patent shall issue for said homestead.

* * *

15. Lands allotted to members and freedmen shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this Act, nor shall said lands be sold except as herein provided.

16. All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each case from date of patent: *Provided*, that such land shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value.

* * *

22. If any person whose name appears upon the rolls, prepared as herein provided, shall have died subsequent to the ratification of this agreement and before receiving his allotment of land the lands to which such person would have been entitled if living shall be allotted in his name, and shall, together with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in Chapter forty-nine of Manfield's Digest of the Statutes of Arkansas: *Provided*, that the allotment thus to be made shall be selected by a duly appointed administrator or executor * * *.

In *Franklin* v. *Lynch*, 233 U. S. 269, a white woman, widow of a Choctaw Indian, having applied to be admitted as a member of the tribe by intermarriage, made a warranty deed in October, 1905, for lands exclusive of homestead which might be finally allotted to her, with an accompanying agreement to make conveyance when the land should be actually allotted. Thereafter she was enrolled as an intermarried citizen, made her selection, and received a patent for land, all of which, except the homestead, she sold for value to other parties. This court held (affirming the supreme court of Oklahoma) that the earlier deed and the agreement were void because until allotment the Indian had no undivided interest in the tribal land nor any vendible interest in any particular tract, and because the attempted conveyance was in conflict with the provisions of sections 15 and 16 of the Supplemental Agreement to the effect that lands allotted should not be affected by any deed, debt, or obligation contracted prior to the time at which such land might be alienated under the Act, and should not be alienable except after issuance of patent. It was contended that the prohibition against sale, in its application to the particular case, had been removed by the Act of April 21, 1904 (Ch. 1402, 33 Stat. 189, 204), providing that "All restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood" should be removed. But we held that while this removed the restriction to the extent of permitting members who were not of Indian blood to sell land after it had been actually allotted in severalty, it did not permit even a non-Indian to sell a mere float or expectancy.

It is insisted that a different rule must be applied with respect to lands allotted pursuant to sec. 22 in the name of a deceased member for the benefit of his heirs, as to which there is no express restriction upon alienation like those found in secs. 15 and 16, and, in the absence of such restriction, no obstacle in the way of the owner conveying his equitable interest after allotment, as was held by this Court in *Mullen* v. *United States*, 224 U. S. 448, 457; (and see like rulings, as to the corresponding provisions of the Creek Agreement, in *Skelton* v. *Dill*, 235 U. S. 206, 210, and *Woodward* v. *DeGraffenried*, 238 U. S. 284, 319). But the decision in *Franklin* v. *Lynch*, *supra*, was based not alone upon the express restrictions, but upon the absence of individual interest in the tribal land prior to allotment and the general policy of

the Agreement not to permit the improvident sales that would result if a prospective allottee were enabled to sell his expectancy.

We have not overlooked the fact that in construing a treaty made October 27, 1832 (7 Stat. 399), between the United States and the Pottawatomie Indians, ceding their possessory interest in certain lands to the United States, with a reservation of a considerable number of sections to particular named Indians to be granted to them when selected, it was held by this Court in two cases that the treaty itself converted the reserved sections into individual property and created an equitable interest that was the subject of sale and conveyance, and that warranty deeds made prior to selection operated to vest the title in the grantee as soon as the lands were selected and patented. *Doe* v. *Wilson* (1859), 23 How. 457; *Crews* v. *Burcham* (1861), 1 Black 352. Nor that a similar result was reached in *Jones* v. *Mechan*, 175 U. S. 1, 21, 23, 32, under the provisions of a treaty with certain bands of Chippewa Indians made October 2, 1863, by which a particular reservation was set apart for one of their principal chiefs.

But we deem it impossible in right reason to apply the doctrine of these decisions to the case in hand. Section 22 of the Supplemental Agreement provides not for any special grant or reservation in favor of particular Indians upon any special meritorious consideration, but makes a substituted provision, in the allotment scheme, in favor of the heirs of any enrolled Indian who might happen to die after the ratification of the Agreement and before selection of his allotment. In the absence of anything to the contrary, the lands prior to allotment were to remain communal, without private interest that was capable of descent or alienation. *Gritts* v. *Fisher*, 224 U. S. 640, 642; *Sizemore* v. *Brady*, 235 U. S. 441, 449-451. And no reason is suggested, nor does any occur to us, for creating by implication from the provisions of sec. 22 a separate interest or equity in the heirs of a deceased member prior to allotment that by the general scheme of the Act and the express provisions of secs. 15 and 16 was withheld from a member entitled to receive an allotment in his own right. The implication is clearly to the contrary; and we hold that not only by the terms of sec. 22 does the equity of the heir of a deceased member take its inception at the selection of the allotment, but that any previous attempt to sell his expectancy is contrary to the spirit and policy of the Act.

Mullen v. *United States*, 224 U. S. 448, 457, cited by plaintiff in

error, is not in point, for the lands there in controversy had been duly allotted, and the only question was whether they might be alienated thereafter and before the issuance of patent, a question affirmatively answered by reference to the ~~provision~~ of sec. 19 of the Act of April 26, 1906 (34 Stat. 137, 144, Ch. 1876).

In confirmation of our view as to the meaning and effect of sec. 22 of the Supplemental Agreement, reference may be made to several Acts of Congress respecting restrictions upon the lands of the Five Civilized Tribes, containing some provisions for their removal, and others for their maintenance except so far as removed, the language of which is inconsistent with the theory that there was any individual interest or equity in such lands prior to the selection of an allotment. Act of April 21, 1904 (Ch. 1402, 33 Stat. 189, 204); Act of April 26, 1906 (Ch. 1876, sec. 19, 34 Stat. 137, 144); Act of May 27, 1908 (Ch. 199, 35 Stat. 312). They amount to a legislative declaration of the true intent and meaning of the Agreements respecting allotment of the lands of these tribes.

The provisions of the Supplemental Agreement having permitted no conveyance of an interest in the tribal lands prior to allotment, it is obvious that this policy cannot be evaded by giving to a conveyance with warranty or its equivalent, made prior to actual allotment, effect as a covenant to convey an allotment thereafter to be selected, either upon the ground of estoppel or because of any state statute having like force. *Starr* v. *Long Jim*, 227 U. S. 613, 624; *Monson* v. *Simonson*, 231 U. S. 341, 347.

Judgments affirmed.

A true copy.

Test:

Clerk Supreme Court, U. S.

END OF CASE